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1115.

Supreme Court of the United States.

OCTOBER TERM, 1893.

IN THE MATTER

OF

THE PETITION OF THOMAS L. EVANS FOR CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS IN THE SECOND CIRCUIT, IN THE SUIT OF PETER NELSON,

Libelant,

vs.

THE STEAMSHIP "MANHANSET," ETC., THOMAS L. EVANS,

Claimant.

TRANSCRIPT OF RECORD.

CONVERS & KIRLIN,
Proctors for Petitioner.

E. B. CONVERS,
Advocate.

The Evening Post Job Printing House, New York.

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United States District Court, 1

EASTERN DISTRICT OF NEW YORK.

PETER NELSON,
Libelant,

2

vs.

The Steamship "MANHANSET," her engines, &c., Thomas L. Evans,
Claimant.

STATEMENT OF PROCEEDINGS. 3

1892.	May 27.	Libel filed.
		Claim filed by Thomas L. Evans, master.
	Aug. 2.	Answer filed.
	Dec. 16.	Cause tried.
	Dec. 27.	Decision rendered.
	Dec. 29.	Interlocutory decree and order of reference entered.
1893.	Jan. 28.	Commissioner's report filed.
	Feb. 9.	Final decree entered.
	Feb. 17.	Notice of appeal filed. 4
	Feb. 27.	Order entered fixing amount of bond, Assignment of Errors and Bond on Appeal filed.

5 UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

PETER NELSON

AGAINST

The Steamship "MANHANSET."

6

The libelant herein appears and files his libel against the above named steamship in the words and figures following, to wit:

To the Honorable CHARLES L. BENEDICT, Judge of the District Court of the United States for the Eastern District of New York:

The libel and complaint of Peter Nelson against
7 the steamship *Manhanset*, her engines, boilers and her tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of damage (personal injury), civil and maritime, and thereupon the libelant alleges and articulately propounds as follows:

FIRST.—That the said steamship *Manhanset*, her engines and boilers, and with her tackle, apparel and furniture, is now in this district.

8 SECOND.—That during the month of January, 1892, and for a long time prior thereto, the libelant was an able bodied seaman on board of, and employed by, said steamship.

THIRD.—That on or about the 11th day of January, 1892, at about six o'clock in the evening, your libel-

ant was about to repair to the forecastle of said ship, he having just been relieved from the charge of the steam winch forward on the main deck. That the night was extremely dark, and the officers in charge of said ship wholly failed to provide any light at said winch to enable your libelant, and others at work there, to see what they were about, and to provide for their safety.

There was a lighter alongside from which the said steamship was taking cargo by the use of the said winch. The winch was being worked by John Douglas, able seaman, on board said steamship, and immediately before your libelant started to leave the said winch, he, said Douglas, had slacked the fall attached thereto, so that it lay loose upon the deck, but owing to the darkness of the night and the failure of the ship to provide a proper, or any, light, your libelant was unable to see said fall or rope, which, as your libelant stepped away from said winch, caught a turn around your libelant's leg, and thereupon said winch was started ahead and said fall or rope tightened about your libelant's leg, breaking and crushing the same.

The ship lay at Pier 26, East River, New York. Your libelant was taken at once to St. Vincent's Hospital, where he still remains.

He has suffered great pain and anguish from said hurt and is permanently disabled thereby, to his damage, five thousand dollars.

FOURTH.—The said injury was not occasioned by any fault or negligence on the part of your libelant, for he stepped where he had a right to step, and where he had a right to assume that it was safe to step, but it was caused through the fault and negligence of the said ship and those in charge thereof in not providing a light at the winch, so that your libelant could see and avoid said rope.

FIFTH.—That said amount has not been paid, or any part thereof, although the same has been demanded.

SIXTH.—That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the libelant prays that process in due
13 form of law may issue against said steamship, her engines and boilers, and her tackle, apparel and furniture, and that all persons having, or pretending to have, any interest therein, may be cited to appear and answer all and singular the matters so as aforesaid propounded, and that this Honorable Court would be pleased to pronounce for the claim aforesaid, with costs, and to condemn the said steamship, &c., to be sold to pay the same, and that the libelant may have such further relief in the
14 premises as shall to law and justice appertain.

PETER NELSON.

Sworn to before me this
26th day of May, 1892.

EDWIN G. DAVIS,
[L. S.] Notary Public,
New York Co.

EDWIN G. DAVIS,
Proctor for Libelant,
114 Nassau Street,
New York City.

15 (Endorsed)—Libel.—Filed May 27, 1892.

16

17

To the Honorable CHARLES L. BENEDICT, Judge of the District Court of the United States for the Eastern District of New York:

And now comes Thomas L. Evans, claimant of the steamship *Manhanset*, and for answer to the libel of Peter Nelson, against said steamship, her engines, boilers, tackle, apparel and furniture; and against all persons lawfully intervening for their interest therein, in a cause of damage, civil and maritime,
18 respectfully shows to the Court as follows:

FIRST.—He admits the matters set forth in the first article of the libel.

SECOND.—He has no knowledge or information relative to the matters set forth in the second article of the libel, and therefore requires proof thereof if material.

THIRD.—He has no knowledge or information sufficient to form a belief, whether on or about the 11th 19
day of January, 1892, at about six o'clock in the evening, the libelant was about to repair to the forecastle of said ship, or whether he had just been relieved from the charge of the steam winch forward of the main deck, but alleges, upon information and belief, that the libelant was relieved from said winch at between five and five-thirty o'clock. He denies that the night, at the time of libelant's injury, was extremely dark, or that the officers in charge of said ship wholly failed to provide any light at said winch, 20
and avers that there was sufficient light at said winch, at the time of the libelant's injury, to enable him and the others at work there, to see what they were about, and to provide for their safety, as it was not yet dark, and there was light shinging upon said steamship from the shed alongside which she was lying.

He admits that there was a lighter alongside, from which said steamship was taking cargo or coal, by the use of the said winch, which had been previously worked by one John Douglas, an able seaman on board said steamship, up to supper time, and explains 21
that the libelant had been called to said winch to relieve said John Douglas, whilst Douglas went for his tea, and admits that just previous to libelant's injury, the fall of the rope had been slacked, so that it lay loose upon the deck, but as to whether the rope had been slacked by the libelant before he left the winch, or by Douglas after he came to it, claimant has no knowledge or information sufficient to form a belief.

He denies, however, that owing to the darkness
22 of the night, or any failure of the ship to provide the proper light to your libelant, he was unable to see said fall or rope, and avers that there was sufficient light for libelant to have avoided said rope by the exercise of care. He admits that libelant was injured by being caught in the bight of rope, and by the failure of the seaman, Douglas, to stop the winch after the libelant called out that he was caught in the rope.

The claimant admits that the libelant suffered pain and anguish from his hurt, but, upon informa-
23 tion and belief, denies that he is permanently disabled thereby to his damage, five thousand dollars.

FOURTH.—He denies the matters set forth in the fourth article of the libel.

FIFTH.—He admits the matters set forth in the fifth article of the libel.

SIXTH.—He denies that all and singular the premises in the said libel are true, but admits the
24 jurisdiction.

SEVENTH.—Upon information and belief, he alleges that about five o'clock P. M., of the 11th of January, the libelant was detailed to operate the winch, while Douglas went to supper, and that he was engaged working with the winch until Douglas' return at about 5:20. At the time of Douglas' return, one or other of the men, thinking more slack was required to let the block down into the barge, unrolled the rope from the drum of the winch and carelessly and unecessarily allowed it to coil up behind the winch.
25 There was no need for libelant to remain at the winch after Douglas' return, and if he had gone away promptly he would not have been injured. He, however, remained by the winch until the order to "hoist" was given, and through his own careless-

ness, there being a sufficient light at the time for him to see if he had looked, became entangled in the rope. He immediately called out to Douglas to stop the winch, and on Douglas' failure to do so, again called that he was caught, asking him to stop the winch. There was abundant time for Douglas to 26
have stopped the winch before the slack was taken up sufficiently to cause any injury to libelant. The claimant avers that the libelant's injury is, therefore, to be ascribed to his own negligence, or to the negligence of his fellow-servant, both being seamen in the employ of the vessel, and not to any negligence on the part of those in charge of the steamer.

Wherefore the claimant prays that the libel may be dismissed, with costs.

CONVERS & KIRLIN, 27
Proctors for Claimant.

Southern District of New York, ss.:

J. P. KIRLIN, being duly sworn, says: That he is one of the proctors for the claimant herein. That the foregoing answer is true according to his information and belief, derived from the statements of the officers of said steamship. He further states that the reason why this verification is not made by the 28
claimant is that the claimant is absent at sea.

J. P. KIRLIN.

Sworn to before me this
30th day of July, 1892.

GEORGE A. BAKER,
[L. s.] Notary Public,
New York Co.

(Endorsed)—Answer.—Filed August 2, 1892.

29 DISTRICT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF NEW YORK.

PETER NELSON

vs.

The Steamship "MANHANSET," &c.

30 December 16, 1892.

Before Hon. CHARLES L. BENEDICT, District Judge.

APPEARANCES:

EDWIN G. DAVIS, Esq., for libelant.
CONVERS & KIRLIN, for claimant.

Mr. DAVIS reads libel.

Mr. KIRLIN reads answer.

Mr. Davis reads deposition of PETER NELSON,
31 taken on behalf of libelant, as follows:

I am 51 years old the 9th of August coming; by occupation a seaman. I live at Sunderland, England. I am a Swede by birth. I have been in England for 30 years. In the month of January last I was an able seaman on board the steamship *Manhanset;* had been on her about a month. I shipped at Sunderland. I have followed the sea since I was 13 years old. I have been on steamers for about 18 years off and on.

On the evening of January 11th, 1892, I was on the
32 bridge and the mate came to me and said, "Nelson, you will have to go and relieve Douglas, so that he can get his tea; he is going to work at 7 o'clock." I went to John Douglas, at the winch at the hatch No. 2, and told him that he must go and have his

tea. He went and got his tea and came back again to relieve me at half-past five. I said, "You have been very quick; I am not in a hurry." I had the cargo runner down in the lighter. There was a lighter alongside; the ship was taking in flour from the lighter. I said to him he might want a little more slack, not very much. I 33
don't think——. He said, "All right, Nelson." I mean he wanted a little more slack, and he let run off the winch all of it. I mean all the rope, or nearly all of it, and it was so dark that he couldn't see. I said to him, "I am going to leave you now." On the lighter he sings out, "Heave up," to Douglas. I stepped forwards to go to the forecastle. I was standing on the port side of winch, about four or five feet from it, forward of it. I was going in the forecastle on the starboard side. I did not expect 34
that anything was foul there to run into; it was so dark I couldn't see, and the rope was just the same as the color of the deck. There was a bight of the rope on the deck and I run right into the snarl. I singed out, "Stop the winch," and I singed out again, "For God's sake stop the winch, I've got my leg in the coil here." He got that frightened that he put more steam on, and I singed out again, "Back the winch." Then he put full speed back, and all the rope got in a snarl on my legs. The 2d 35
mate and Charles Thompson, an able seaman, camt running and said, "For God's sake, man, what are you doing?" He tried to pull me out of it, but they could not get me out. I was that snarled in that they could not get me clear. The 2d mate singed out, "Is there no one got a knife?" Charles Thompson says, "I've got a good one," and he cut the rope on the fore part of the winch. The 2d mate said, 36
"God in heaven, are we not going to get him out from there, cut the after part, too." Then they got me out. The 2d mate said, "Do you think your leg is broke?" I said, "It is smashed up to pieces altogether." 2d mate and Thompson carried me into the forecastle and put me down on the floor.

They took my boot and stocking off. My foot turned right around, and toes hanging right down. The 2d mate, he says, "Oh, God, that leg is pretty near off." The mate then came forward. He sent for the ambulance and Dr. Weeks came down with him and took me out of it.

37 The ship lay at Pier 26, East River, New York. I was taken to St. Vincent's Hospital; reached there about seven o'clock. I remained there until the 13th day of June. Dr. Shea and Dr. Fowler and Dr. Weeks attended me in the hospital. My leg is still sore. I cannot walk upon it. If I sit down a little I have to stand a long time before I can walk. When I have walked a little the pain goes away. In the day time it swells up; in the night time the swelling goes down again. There is a great sore just above the ankle about an inch and a half long.
38 I suffer with it greatly. If there is going to be rain I feel it worse. When at work aboard ship before the mast I had £4 15s. a month. I was hurt at about half-past five. The night was dark. It had been raining and snowing together, but it had stopped. The night was not very clear.

There was no light on board the ship near the winch. There was no light on board the ship that showed at the winch I couldn't see the rope on the deck, if I could I would not have stepped into it. There was a light down below in the hatch, down in
39 the hold, but it gave no light at the winch.

Mr. Kirlin reads CROSS-EXAMINATION, as follows:

I was just going to walk away when the rope caught me. I had made a step. I stepped into the rope.

Q. Did you look to see where you were stepping? A. Of course I looked, but I couldn't see anything. I looked right ahead where I was walking. I looked down at the deck, it was rather slippery. The rope was about 2½ inches, 4 stranded manilla, very stiff;
40 it always is in cold weather. I have run winches very often in other boats as well as this.

Q. When the rope is stiff and frosty and you give too much slack at the winch, the man who runs the winch gives too much slack, you know the rope is likely to curl up on the deck? A. Not often, sometimes it will happen.

Q. Did you think to look to see if it had happened this time? A. No, I didn't look. I didn't expect such a thing. I was standing close alongside Douglas when the rope caught me. I had stood there about two minutes, not that, after Douglas relieved me. I 41
heard the order from the lighter and I knew Douglas was about to start the winch. I had worked at a winch in the night time before, both at sea and in port, and when I did so on other boats I had a light alongside the winch, not in this boat; this boat had no light, others had. They put light at the winch in other boats when it was dark. We never had a light at the winch on this boat. I had worked at this winch before at night when I relieved others to go to tea. I didn't ask for a light. The officers 42
always manage that aboard of ship. I never complained that I did not have a light on these occasions.

Q. You knew you were likely to get hurt and run some risk unless you had a light, didn't you? A. I never thought about that. I never saw the rope kink about the deck when slacked too much on this boat. If I had seen it I wouldn't have stepped into it. It was about as dark when I went to relieve Douglas as it was when he came back and I was hurt. I had no trouble running the winch in the dark. I don't know where the 2d mate was standing when I was hurt. Thompson was up on 43
the bridge fixing up a dodger on the port side. The bridge is near 100 feet away from where I was hurt. Thompson was standing on the port side of the bridge when I was hurt. I couldn't see Thompson on the bridge while I was at the winch and I did not take any notice of it.

Q. Could you see Thompson on the bridge while

you stood at the winch just before you were hurt?
44 A. I did not look at all. I had my own work at the winch.

Q. Did you see him? A. I did not see him. There was a light down in the lighter's wast. I told you all that I said to the second mate and all that he said to me on this occasion. I couldn't say who was on deck when I was hurt. No one was near the winch except me and Douglas.

Q. If Douglas had stopped the winch when you first called to him would you have been hurt? A. No, sir.

Q. Was it possible for a man at the winch under
45 these circumstances to have stopped it in time? A. Yes, sir.

Q. Are you sure of it? A. Yes, sir; quite so.

Q. Would you have been injured if Douglas had not put the winch full speed back? A. Oh, yes.

Q. Would you have been injured if Douglas had not got frightened and put more steam on? A. I would not.

Q. What made you think that Douglas ought to give a little more slack at the winch? A. Because I
46 was not sure if they had enough in the lighter; they had not put on the sling then.

Q. Who gave the order to the man at the winch? A. The man in the lighter. He sang out. I could see them in the lighter, they had a light there. I worked the winch about twenty minutes while Douglas was at his tea. I did not notice the rope was likely to kink while I was working the winch. I do not know whether the second mate was on deck from the time he gave me the orders. I had been on
47 deck all the afternoon before I got orders to relieve Douglas. I was then fixing the starboard dodger on the bridge.

WEATHER BUREAU, NEW YORK CITY.

(Copied from Station Records.)

Jan. 11" 1892.

Snow began at 4.30 A. M. and ended at 6.48 A. M.
Snow began again at 8.50 A. M. and ended 10.40 A. M.
Sleet began at 10.49 A. M. and ended at 12.32 P. M. 48

Total amount of precipitation .05.

At 8 A. M. the weather was cloudy with some fog. Wind north 16 miles an hour.

At 8 P. M. weather cloudy, wind north 16 miles an hour.
Cloudy all day; no break in clouds during entire day.

J. W. BAUER,
By W. L. Day,
Asst. Observer.

49

Mr. Kirlin reads deposition of JAMES TAYLOR, taken on behalf of claimants, as follows:

I am fifty-nine years of age, and reside in New York. On January 11, 1892, I was a 'longshoreman in the employ of Messrs. T. Hogan & Sons. Along in the afternoon of the 11th of January, 1892, I was working cargo at No. 3 hatch aboard the steamer. I was getting ready to take in cargo at No. 3 hatch, when I heard there was a man hurt at No. 2 50 hatch.

Q. Who told you? A. The man who was tending gangway, John Johnson, told me he cut the fall in the No. 2 winch, and he wanted me forward.

Q. What did you do? A. I went forward, unrove the fore winch and the offshore pin, and spliced the one that had been cut.

Q. Did you see Nelson at that time? A. No, sir; I did not see the man at all.

Q. Where was he when you were there? A. I
51 don't know; I did not see him.

Q. Do you recollect how light it was when you went forward to No. 2 hatch? A. Light enough for me to see quite a distance. I could see half the length of the ship.

Q. Do you recollect what the weather was at that time? A. It seems to me the weather was clear; the wind was from the west.

Q. Did you see any ropes lying around on the deck in the neighborhood of No 2 hatch? A. Only the
52 ropes we were working with, taking in falls.

Q. And how far away from you were any of the ropes you could see at that time? A. I can't exactly say; I had the ropes in my hand, so they could not be a great deal away from me.

Q. How far could you see the ropes? A. Over 100 feet, distinctly.

Q. And how far from you could you see ropes on the deck? A. I could see 100 feet.

Q. How long have you been in the occupation of 'longshoreman? A. Over twenty years.

53 Q. And most of the time at New York? A. Yes, in the port of New York.

Q. And during that time have you, or not, had occasion to be present at the discharge of very many steamers? A. A great many.

Q. Would it be possible for you to state approximately how many? A. I couldn't say. We are working on them all the time—year in, year out.

Q. Has it been your duty, when working, to be a part of the time on the decks of these steamers? A.
54 On the decks and in the holds.

Q. Have you ever run a winch yourself? A. Once in a while, when the man has been away from there.

Q. When it was as light as it was after you say you heard that a man had been injured at No. 2 hatch, have you ever seen lanterns or lamps in use at the winch for the assistance of the winchman?

Objected to as incompetent and immaterial.

A. Sometimes we will have a lamp there; then, again, they won't. 55

Q. Most of the time you use a lamp for oiling the winch? A. That is only once in a while.

Q. Is the lamp used, do you know, for any other purpose than that? A. Not that I am aware of.

Q. Have you ever seen Nelson, the libelant, before? A. Well, I might have seen the man, but I can scarcely recognize him.

It is admitted that the libelant is present at this examination. 56

CROSS-EXAMINATION by Mr. Davis:

Q. Where do you live? A. I live at 59 Perry street, near West Fourth.

Q. How long have you lived there, in that place, at that address? A. About two and a half years.

Q. What date did this accident happen that you are telling about? A. Somewhere along about the 11th or 14th; from the 9th to the 15th of the month; I couldn't say. I didn't keep no memorandum.

Q. And from the 9th to the 15th of the month, 57 you remember which way the wind was? A. I say that the evening the gentleman got hurt, the wind was from the west and the weather was clear.

Q. You remember now that the day that the man was hurt—the evening of the day that this man was hurt—that the weather was clear and the wind to the westward? A. I can't say, but I——

Q. Now, do you say that you remember to-day, that the day this man was hurt, that the weather was clear? A. Yes; I do remember the weather was 58 clear, because I could see quite a distance from me, and it was cold.

Q. And the wind was from the west? A. That I would not like to be positive about, but I think the wind was from the west.

Q. You were positive a little while ago that the wind was from the west? A. I might have said it, but still not be positive. I say the weather was clear.

59 Q. You have stated some three or four times in the course of this examination that the wind was to the west? A. I won't be positive whether I did or not, but the weather was clear. The weather was clear and dry.

Q. Clear all day? A. I can't say as to that, but it was clear in the evening.

Q. And all the afternoon? A. Yes.

Q. No snow fell? A. Not to my knowledge; no.

Q. No rain fell? A. Not to my knowledge; no.

60 Q. The decks were not covered with ice from falling snow and rain? A. No.

Q. Do you know anything about it? A. Not to my knowledge there was neither rain nor snow.

Q. Do you know anything about it, I have asked you. Do you mean to say in answer to that question, "not to my knowledge?" A. I did not see either rain or snow on that day.

Q. Were you outdoors? A. Yes, sir; I was on the ship's deck all day.

Q. Now, what time of day was this man hurt?

61 A. Probably four or five o'clock, or between five and six o'clock; that is about as near as I can fix it.

Q. The sun was shining brightly, wasn't it? A. No, sir; the sun must have dipped the time of the accident. It was twilight.

Q. It was not along in the afternoon, then? A. I don't know what you call the afternoon.

Q. Was it along in the afternoon? A. It was along in the afternoon, about twilight. What I

62 call twilight is not day; it was getting dark.

Mr. KIRLIN reads deposition of JOHN JOHNSON, a witness on behalf of the claimants, as follows:

Q. What is your age? A. I was born in 1854, 26th of November.

Q. What is your business? A. Working 'longshore; a 'longshore seaman.

Q. How long have you been engaged in that busi-

63 ness? A. Along with the firm I am working for, pretty near 13 years.

Q. Whom? A. I am working for T. P. Hogan & Sons.

Q. Were you working on board the steamship *Manhanset* on January 11, 1892? A. Yes, sir.

Q. What were you engaged at? A. I was attending on the gangway; I was taking in stuff.

Q. At what hatchway? A. Hatchway No. 2.

Q. Do you recollect an accident that happened at that time to this man Nelson who is here? A. I don't know if that is the man, but a man got his leg broke in the winch. 64

Q. How far were you standing from the winch at the time that the accident happened? A. Somewhere about twenty feet away from it.

Q. In which direction from it? A. From the north to the south. She was lying up to the dock, and I was right in the fore part of the ship. The winch was here, and I was right over there, about twenty feet away from it.

Q. How near the rail of the vessel were you at the time? A. I was standing right on the rail. 65

Q. Were you standing on any platform? A. I stood on the rail when the accident happened. The draft was coming in; we were lifting a draft from the barge at the time.

Q. And the barge was lying alongside the ship? A. Yes.

Q. Which side? A. On the port side of the ship.

Q. What were you taking on board? A. Flour in bags. 66

Q. And how many bags constituted a sling load? A. Twelve.

Q. About what time of the day was it that this happened? A. It was about twilight; between five and six or close onto six o'clock. I didn't take no time over it. I didn't look at the time when it happened. It was twilight anyway; between five and six o'clock; a workman ain't allowed to carry any time with him, anyhow.

Q. Had you seen the man who was hurt standing 67

near the winch before the accident took place? A. I didn't see him.

Q. He was driving the winch when you were looking at him? A. He took the cargo for me during the time the other man went forward, and it seems to me the other man came back and relieved him.

Q. And were you looking at him when he was caught by the ropes and hurt? A. Not until I heard the screams of him.

68 Q. Then did you look? A. Then I jumped down and pulled him out, and I got my hand all skinned from pulling the man's leg out that was broke.

Q. Had you seen any slack rope on the deck during the time that he was there, and the cargo was being worked? A. No, I didn't see any slack rope, but that is a thing I can't swear to.

Q. And what was his situation when you went to him to help him out of the rope; how was he lying and how was the rope? A. He was lying on the flat of his back, and his leg was pulled in between a

69 small space; his leg was pulled in between a steam pipe and the reversing gear (witness indicating about six or eight inches).

Q. What part of his leg was the rope twisted around? A. Round his ankle.

Q. How large a rope was it? A. About three and a half inches right around it.

Q. Was it necessary to reverse the winch in order to get his leg out? A. Certainly it was.

Q. Who did it? A. The man who was driving

70 the winch; instead of reversing it he went ahead with it again, and in so doing my hand was hurt.

Q. Now, when you were working about the man and trying to get his leg out from the rope, was it light enough for you to see the rope any distance off? A. Certainly.

Q. How far off could you see the rope in the light there then was? A. I could see half the length of the ship, anyhow, plainly enough, all the time; about 100 feet, anyway; I could see that far.

Q. While you were standing there working about, and before you stepped down, could you see the rope on the winch? A. Certainly. I could see the man, but I could not see the rope lying down on deck, but I know exactly how it was done, by pulling the slings up. The man at the winch helps the man that is on the stage to pull them up, and I know it must have been lying coiled when this gentleman got his foot caught; that is the only thing I know. 71

Q. Do you mean to say you could not see the rope on the deck yourself—that it was not light enough; that you could not see the rope if it had been at your feet? A. I only imagine the way the rope was lying down on deck. 72

Q. When you came up to relieve Nelson from the position in which his leg was caught, did you see the rope? A. I seen the rope around his leg; yes.

Q. And how far off from him were you when yon saw the rope around his leg? A. Close to him.

Q. Were you standing up? A. I had to jump down from where I was.

Q. Were you standing on the deck? A. No; on the gangway. 73

Q. That was before the accident you stood on the gangway? A. Yes.

Q. And when you went to relieve him, you jumped down from the winch? A. When any man hollows murder, I run and help him.

Q. Did the man seem as if in suffering? A. I can hear it in my ears now.

Q. And how far off from him were you when you first saw he had a rope around his leg? A. I was about twenty feet away from there when I heard the man scream. Then I jumped off the stage the same as you will jump to relieve a person that is dying. 74

Q. When you stood by the winch and looked down at Nelson, I want to know whether you could see the rope? Q. Certainly; I could see the rope easy enough; I could see the man, too. It was

not dark; it was a nice clear night; it was cold all the same.

Q. Was it not light enough for you to see a piece
75 of rope on the deck while you stood up? A. Certainly; there was light enough to see anything pretty near.

Q. While the vessel was here at that time, did you see Nelson having anything to do with the lamps? A. Yes, sir; he was called the lamp-trimmer. I seen him giving out oil, sewing sails and so on.

Q. During the time that you have been working for T. Hogan & Sons, you have had occasion to discharge and take on board many cargoes, haven't you? A. Certainly.

76 Q. It is impossible for you to state how many, isn't it? A. Yes.

Q. Is it customary, when the winches are working in taking cargo on board or discharging the same, to have lights? A. No, not exactly; well, you want to oil the winch; the winch driver that drives the winch, he don't want no light at all; but a man on deck, like me, to tend a hatch, he wants a lamp to see what he is doing; but the winch driver don't want no lamp; to drive a winch he wants to be in the dark, only he wants to see the man and the light that is tending the hatch.

77 Q. Do you mean he could not get the signals from him? A. The same as a man in the pilot-house of a ferryboat; he ain't allowed to have a light there; the same with the winchman; he don't want no light at all; he wants to be in the dark; but the man that is giving the signals he wants to have a light; but it was not dark enough to use any lamps at all whatsoever.

CROSS-EXAMINATION by Mr. Davis:

78 Q. What day of the month was this? A. It happened on the 11th, I guess, of January.

Q. Why do you guess it happened on the 11th of January? A. I never put it down.

Q. Did you guess that because Mr. Convers used that date when he asked you the question. Do you remember anything about what date it was? A. I don't remember what date it was; it was on the 11th, I guess.

Q. Do you remember that it was on the 11th of January? A. I do.

Q. You do; how do you remember? A. I com- 79
menced to correspond with the foreman about it—Mr. Nelson. I corresponded with Mr. Nelson about it.

Q. With this Nelson? A. No, the boss. I asked him what day it happened. I knew it happened on the 11th, but what day the 11th fell on I couldn't tell you.

Q. How did you know that? A. A person follows up the alphabet and the newspapers, and so on.

Q. And it is from following up the alphabet and 80
the newspapers, and so on, that you now know that this accident happened on the 11th of January? A. On the 11th; that is the time it happened.

Q. And is it from following up the alphabet and the newspapers, and so on, that you know that it was the 11th that it happened? A. Yes.

Q. What kind of a day was the 11th of January last? A. A fair day.

A. All day long? A. Yes.

Q. You remember now that it was a fair day, all day long? A. A fair day, and a very cold day, 81
too.

Q. It didn't rain that afternoon? A. No, sir.

Q. It didn't snow that afternoon? A. No, sir,

Q. Of that you are quite sure? A. I am sure of it.

Q. When this happened, you were at work on the rail, on the port side of the ship? A. I was on the gangway, on the rail. I was standing on the rail, and according as they took in stuff I had to pass the drafts in, and we've got to stand on the rail with one foot. 82

Q. You were taking cargo from a lighter alongside the ship? A. Yes, sir; from a barge.

Q. Was there a light on the lighter at the time? A. Yes, there was one light for the tallyman to see the numbers on the bags.

Q. Had the lights been distributed on the ship at the time this man was hurt? A. No.

Q. Don't you know that Nelson himself had distributed the lights on the ship before he was hurt
83 that day? A. I don't know.

Q. Were the lights lighted in the street at the time he was hurt? A. I don't know.

Q. Were there many lights lighted on the ship at the time he was hurt? A. Yes; in the alleyway.

Q. Where else? A. That is all I know.

Q. Were the lights in the cabin lighted? A. I don't know.

Q. Where is the alleyway? A. The alleyway is underneath the bridge, on both sides.

84 Q. How high are the bulwarks to this ship? A. I don't know.

Q. You stepped down from the rail to the deck? A. Jumped down.

Q. About how high was the rail from the deck? A. About six feet high, pretty near; pretty near as high as me.

Q. How near to the forecastle is this winch where this man was hurt? A. I don't know; you are asking me too much.

85 Q. Whereabouts on the ship was this winch located? A. Abaft the foremast.

Q. How near? A. I did not measure.

Q. You can guess? A. No, I can't guess.

Q. Was it ten feet? A. I don't know.

Q. Was it two feet? A. It was more than two feet.

Q. How much more than two feet? A. I don't know.

Q. Was it six feet? A. I never measured.

86 Q. What is your best judgment about that; how

far abaft the foremast was the winch? A. I could not judge about it, because I might tell a lie.

Q. We are only asking your judgment; you can can only tell a lie when you represent something that you know to be false. Can't you give us your best judgment about the distance between the foremast and the winch? A. That must be between six and eight feet.

Q. How near to the winch is the first house abaft the winch? A. The whole length of the main hatch. 87

Q. About what is the length of the main hatch? A. I don't know.

Q. Your best judgment? A. I never measured it.

Q. I only want your best judgment? A. I can't exactly judge it; I never measured on the ship. I worked on the ship, and that is all I know. I won't tell no lie.

Q. What sort of a house is the forecastle? A. Beneath the forecastle head and the bow of the ship.

Q. Is the forecastle deck flush with the rail forward? A. No. 88

Q. How near flush is it; how much below the top of the rail is it? A. Six or seven feet.

Q. Then the forecastle deck is flush with the main deck? A. No, it ain't flush; there is a roof over the house.

Q. You worked on this ship? A. Yes.

Q. How often have you worked on her? A. This was the first time I worked on her; she was a brand new ship.

Q. How many times since? A. Never. 89

Q. Don't you remember how the forecastle was arranged? A. That has got nothing to do with the accident, the forecastle.

Q. Johnson, there is a forecastle deck on that ship? A. Yes.

Q. How high is that from the main deck, should you think? A. That is what I don't know. I think

the forecastle deck is somewhere about seven feet above the main deck.

90 Q. This winch was abaft the foremast, and the man who works it stands on the main deck, doesn't he? A. Certainly.

Q. Are there any other houses on the ship between the forecastle and the foremast? A. No

Q. Were there any chain boxes or anything of that sort there? A. No.

Q. What do these alleyways that you speak of run between; the engine house and the bulwarks? A. Yes, between the engines and the bulwarks, and

91 one on each side.

Q. It is not customary to keep lights in those alleyways in the daytime, is it? A. No, sir.

Q. You think that the man running the winch should stand in the dark, in order that he might better see the man who is taking in cargo from the barge? A. Yes, sir.

Q. So that he might better see the signals that the man taking the cargo gives? A. Yes, sir.

Q. How often have you run a winch? A. Thou-

92 sands of times.

Q. All sorts of hours? A. Yes, sir.

Q. Where was the chief mate when Nelson was hurt? A. He was alongside of him; the mate cut the rope.

Q. Was it the chief mate or the second mate? A. The chief mate.

Q. Now the chief mate was alongside of Nelson when he was hurt? A. He was on the bridge but he jumped down the same as I did. He came to assist the man.

93 Q. Was the second mate there. A. No, sir, not to my knowledge?

Q. It was not the second mate who cut the rope? A. The chief mate can't be the second, can he? I said it was the first mate.

Q. I ask you, Johnson, did the second mate cut the rope? A. I said the first mate cut it.

Q. That is your answer? A. Yes, the first mate cut the rope.

Q. What is the chief mate's name? A. I don't know. 94

Q. Do you know a man by the name of Thompson who was there? A. No, sir.

Q. Now, wasn't it a seaman by the name of Thompson who cut the rope? A. No, sir, not a seaman.

Q. You are sure of that? A. The first mate cut the rope.

Q. How long had you been working on deck that afternoon? A. I was working all day.

Q. So that you were outdoors all day? A. Yes.

Q. And you can't be mistaken in your knowledge 95 of the weather? A. No.

Q. If it had snowed you would know it? A. Certainly.

Q. If it had rained you would know it? A. Yes, sir.

Q. It neither snowed nor rained that day. A. Not that day, no.

Q. It did not snow that day, and it did not rain? A. It was a clear day like to-day, but it was very 96 cold though.

Mr. Kirlin reads statement of WALTER ALBION 97 MORGAN, as follows:

I have held a master mariner's certificate for the last thirteen years. I was chief officer of the steamship *Manhanset*, of Liverpool, on the 11th of January, 1892. On that day I was on duty on the bridge, when that vessel was loading from a lighter at the pier at which the *Bristol City* and Leith Line boats discharge. We were lying with our starboard 98 side against the shed, the doors of which were open. The lighter was on our port side and we were using No. 2 port winch loading into No. 2 hatch. No. 2 port and starboard winches are alongside of each other and are between the foremast and No. 2 hatch. No. 2 port winch is worked with a lead from the

foremast. The man working it stands on the port side of the winch, where the lever and valve both are. He faces toward No. 2 hatch I do not re-
99 member whether we were using the forewinch, which is between the foremast and the forehatch. It is also worked with a lead from the foremast.

Between 5 and 5.30 P. M., I heard some one call out as though they were hurt, and I at once went forward and saw Nelson with the rope of No. 2 port winch round his leg, and his leg against the winch. I at once ordered the winch to be reversed and got him released and afterwards sent to the hospital.

I do not know as a matter of fact whether Nelson
100 had been working in the winch or whether he was relieving the winch; but whether he was going to or coming from the forecastle, he had no reason whatever for going near where the coil of rope would be lying, because the sailors' forecastle is on the starboard side, and there is a clear space between it and the firemen's forecastle. His route from the winch should have been straight forward along the clear deck, past No 1 hatch, and along the top of it and into the forecastle.

I think Nelson must have been passing between the winch and the foremast with the intention of go-
101 ing along the starboard side to the forecastle, and in so doing stepped in to the rope, and the other man had started it and so caught Nelson's leg in it.

There was no need for a light to be provided at the winch. I could from the bridge see the man at the winch and the ropes of the winch working.

If Nelson was going from the winch he must have worked the winch back himself, before he gave it up to Douglas, and must, therefore, have known that the rope was on the deck.

102 Dated September , 1892.

(Signed,) WALTER ALBION MORGAN.

It is hereby stipulated that the foregoing statement of Walter Albion Morgan, late chief officer of the steamship *Manhanset*, may be read in evidence by the claimant upon the trial of this action in lieu of his deposition.

Dated New York, October 31, 1892.

EDWIN G. DAVIS,
Proctor for Libelant.

CONVERS & KIRLIN,
Proctors for Claimant.

Opinion.

DECEMBER 27, 1892.

BENEDICT, *J.*—The personal injuries to the libelant, for which he seeks to recover in this action, arose out of his stepping into a snarl in the fall of the winch, which lay upon the deck of the steamer. The fall was not observed by him, because the winch was running after dark, without a light placed so as to enable the fall to be seen by one walking along the deck, and when he stepped into the snarl his leg was drawn into the winch and severely injured.

In my opinion, the failure to have a light by the winch, when running after dark, was the cause of the libelant's injury, and was negligence which renders the ship liable for the injury to the libelant resulting therefrom.

The act of the man who was running the winch, in making the winch go faster instead of stopping it when alarm was given that the libelant was caught in the fall, was an act *in extremis*, caused by alarm at the dangerous situation of the libelant when caught by the fall.

It cannot be held to be a fault of the man at the winch which contributed to the disaster. The fright of the man at the winch which caused him to run the winch faster, when it should have been stopped, was one of the results of the failure to provide a light

at the winch, and for which the ship is responsible.

Let a decree be entered in favor of the libelant and an order of reference to ascertain the amount of his damages.

At a Stated Term of the District Court of the United States for the Eastern District of New York, held at the United States Court Rooms, in the City of Brooklyn, in the year of our Lord one thousand eight hundred and ninety two.

The Honorable CHARLES L. BENEDICT,
District Judge.

PETER NELSON

vs.

The Steamship "MANHANSET."

The cause having been heard upon the pleadings and proofs, and submitted upon the argument and briefs of the advocates for the respective parties, and due deliberation having been had thereon.

Now, on motion of Edwin G. Davis, proctor for libelant, is is

Ordered, adjudged and decreed, that the libelant herein recover the damages by him sustained by reason of the matters alleged in the libel herein, and that the said steamship *Manhanset* be condemned therefor.

And on like motion it is further ordered, that it be referred to a United States Commissioner to ascertain the amount of the damages sustained by the libelant, and report thereon to this Court, with all convenient speed.

CHAS. L. BENEDICT.

(Endorsed)—Interlocutory Decree and Order of Reference.—Filed and entered the 29th day of December, 1892.

UNITED STATES DISTRICT COURT, 113

EASTERN DISTRICT OF NEW YORK.

PETER NELSON

vs.

The Steamship "MANHANSET," &c.

Commissioner's Report.

114

To the Honorable CHARLES L. BENEDICT, Judge of the District Court of the United States for the Eastern District of New York:

In pursuance of a decretal order of reference made and entered in the above entitled cause, by which it was referred to a United States Commissioner to ascertain the amount of damages sustained by the libelant herein and report thereon to the Court,

I, B. Lincoln Benedict, United States Commissioner, to whom the matter has been brought, do respectfully report: 115

That I have been attended on such reference by the proctors for the libelant and respondent and witnesses, and have taken and examined the proofs offered in evidence, and thereupon report as follows:

That for loss of time, medical treatment, board and other expenses incurred, for pain suffered, and for permanent disability incurred from the injury for which he is adjudged entitled to recover damages under the libel, he should receive the sum of seventeen hundred and fifty dollars ($1,750); and I report the amount of damages sustained at the above named sum. 116

All of which is respectfully submitted.

B. LINCOLN BENEDICT,
U. S. Commr.

Dated January 21, 1892.

(Endorsed)—Commissioner's Report.—Filed January 28, 1892.

117 At a Stated Term of the District Court of the United States of America for the Eastern District of New York, held at the United States Court Rooms in the City of Brooklyn, on the 9th day of February, in the year of our Lord one thousand eight hundred and ninety-three.

Present—The Honorable CHARLES L. BENEDICT,
118 *District Judge.*

PETER NELSON,
Libelant,

AGAINST

The Steamship "MANHANSET," &c.

An interlocutory decree having been heretofore
119 entered herein, whereby it was referred to a United States Commissioner to ascertain and compute the amount due the libelant by reason of the matters and things in the libel alleged, and the Commissioner having reported the amount due the libelant as $1,750, and the costs of the libelant having been duly taxed at $97.95

Now, on motion of Edwin G. Davis, proctor for libelant herein, it is

120 Ordered, adjudged and decreed, that the said report be, and the same is hereby in all things confirmed, and that the libelant recover of the steamship *Manhanset*, her engines, &c., and her claimant, the sum of $1,750, amount of Commissioner's report, with $97.95 costs as taxed, in all the sum of $1,847.95, and that said steamship and her claimant be condemned therefor. And it is

Further ordered, that unless an appeal be taken from

this decree within the time and in the manner prescribed by law and the rules and practice of this 121
Court, or this decree sooner satisfied, that the stipulators on the stipulations for costs and for value filed on behalf of the claimant of the steamship *Manhanset*, cause the obligations of their stipulations to be performed or show cause before this Court within four days after the expiration of said time why execution should not be executed against them.

CHARLES L. BENEDICT.

(Endorsed)—Final decree.—Filed and entered the 122
9th day of February, 1893.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

123

PETER NELSON,
Libelant,

AGAINST

The Steamship "MANHANSET,"
THOS. L. EVANS,
Claimant.

124

Please take notice that the claimant hereby appeals from that part of the final decree entered in this cause on the 9th day of February, 1893, which adjudges a liability on the part of the steamship *Manhanset* for the injuries sustained by the libelant, and that he will ask leave to make new allegations and produce further proofs upon this point on the said appeal, notice being hereby given that the claimant on the said appeal does not intend to raise 125

any question as to the amount of the damages awarded.

NEW YORK, February 15, 1893.

CONVERS & KIRLIN,
Proctors for Claimant.

To B. LINCOLN BENEDICT, Esq.,
Clerk.

EDWIN G. DAVIS, Esq.,
Proctors for Libelant.

126 Due service of a copy of the within notice admitted this 17th day of February, 1983.

EDWIN G. DAVIS,
Proctor for Libelant.

(Endorsed)—Notice of Appeal.—Filed February 17, 1893.

UNITED STATES CIRCUIT COURT OF APPEALS

127

FOR THE SECOND CIRCUIT.

PETER NELSON,
Libelant;

AGAINST

The Steamship "MANHANSET,"
THOS. L. EVANS,
Claimant.

128

ASSIGNMENTS OF ERROR.

The appellant assigns error to the decision of the District Court, in the following particulars:

FIRST.—For that the Court found that the failure to have a light by the winch at the time and place of libelant's injury was the cause of the accident.

SECOND.—For that the Court found that the failure to have a light at the winch at the time of the injury to libelant was negligence which renders the ship liable for the injury to the libelant. 129

THIRD.—For that the Court omitted to find that libelant's injury was caused or contributed to by his own negligence, and—or the negligence of a fellow servant.

FOURTH.—For that the Court omitted to find that it was light enough at the time and place of the accident for the libelant to have seen and avoided the danger by the exercise of reasonable care. 130

FIFTH.—For that the Court omitted to find that if the absence of a light at the winch at the time of the accident was a source of danger, libelant, by continuing to remain at or near the winch, in the presence of danger, without objection, assumed the risk of injury thereby.

SIXTH.—For that the Court omitted to find that the libelant's work at the winch had been finished before the rope was unwound from the winch and coiled up on the deck; and that if he had not loitered about the winch after his business there was ended, the injury complained of would not have been sustained. 131

SEVENTH.—For that the Court entered a decree in favor of the libelant, awarding damages for his injuries.

EIGHTH.—For that the Court omitted to dismiss the libel as prayed. 132

CONVERS & KIRLIN,
Proctors for Appellant.

Endorsed—Assignment of Errors. Filed, February 27, 1893.

133 At a Stated Term of the District Court of the United States for the Eastern District of New York, held at the United States Court Rooms, in the City of Brooklyn, on Monday, the 27th day of February, in the year of our Lord 1893.

Present—Hon CHARLES L. BENEDICT, *District Judge.*

134

PETER NELSON,
Libelant and Appellee,

AGAINST

The Steamship "MANHANSET,"
THOS. L. EVANS,
135 Claimant and Appellant.

On the final decree herein, and on motion of Convers & Kirlin, proctors for claimant, it is

Ordered that the supersedeas bond to be given by the claimant on his appeal to the United States Circuit Court of Appeals from the final decree entered herein on the 9th day of February, 1893, be in the sum of $2,300.

CHAS. L. BENEDICT.

Endorsed:

136 Order: Filed and entered Feby. 27th, 1893.

UNITED STATES OF AMERICA,
Eastern District of New York.

I, B. LINCOLN BENEDICT, Clerk of the United States District Court for the Eastern District of New York, do hereby certify that the foregoing is a true record of the pleadings, proofs and papers on appeal, on file in my office, in the suit of Peter Nelson against the steamship *Manhanset*, her engines, &c., made up to

be transmitted to the United States Circuit Court of Appeals for the Second Circuit, pursuant to rule. 137

In witness whereof I have hereunto set my hand and affixed the seal of said Court at Brooklyn, this 15th day of March, 1893.

B. LINCOLN BENEDICT,
[SEAL.] Clerk. 138

United States of America, ss.:

By the Hon. E. HENRY LACOMBE, Judge of the United States Circuit Court of Appeals, for the Second Judicial Circuit, to Peter Nelson, greeting:

Whereas, Thomas L. Evans, claimant of the steamship *Manhanset*, has appealed to the United States Circuit Court of Appeals for the Second Circuit, from a decree rendered in the District Court of the United States for the Eastern District of 139 New York, made in your favor against the steamship *Manhanset*, Thomas L. Evans, claimant, and has filed an assignment of errors and obtained a supersedeas as required by law. You are therefore hereby cited to appear before the said United States Circuit Court of Appeals, for the Second Circuit, at the City of New York, on the 30th day of March, 1893, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of New York, 140 this 3d day of March, 1893.

E. HENRY LACOMBE.

CONVERS & KIRLIN,
Proctors for Appellant.

UNITED STATES CIRCUIT COURT OF APPEALS,

141 SECOND CIRCUIT.

PETER NELSON,
Libelant and Appellee,

AGAINST

The Steamship "MANHANSETT," her engines, &c., THOMAS L. EVANS,
Claimant and Appellant.

Decree affirmed, with interest and costs, on opinion of District Judge.

December 5, 1893.

UNITED STATES CIRCUIT COURT OF APPEALS 142

FOR THE SECOND CIRCUIT.

PETER NELSON,
Libelant and Appellee,

AGAINST

The Steamship "MANHANSET," her engines, &c., THOMAS L. EVANS,
Claimant and Appellant. 143

TO THE HONORABLE THE JUDGES OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petition of the claimant and appellant Thomas L. Evans respectfully shows to the Court as follows:

FIRST.—This was an appeal from the decree of the District Court of the United States for the Eastern District of New York, in admiralty, awarding judgment for the libelant in the sum of $1,847.95 as damages for personal injuries sustained on board the *Manhanset* January 11, 1892. The cause came on for argument on November 17, 1893, and on December 5, 1893, a decision was handed down by this Court affirming the decree on the opinion of the District Judge. The mandate remanding this cause to the District Court has not yet been issued. 144

SECOND.—Your petitioner prays that the following points, which he is advised are material to the final decision of this cause, together with a statement of the essential facts, be certified by this Court to the Supreme Court of the United States in order that its instruction may be obtained thereon, pursuant to Section 6 of the Act of Con-

145 gress, approved March 3, 1891, entitled, "An Act to establish Circuit Courts of Appeals, &c.," namely:

I.—Whether the absence of a light from the winch, near which the libelant was injured on the main deck of the *Manhanset*, was negligence *per se* on the part of the owners of the vessel, or whether it would be negligence only upon allegation and proof of a custom to have a light by a winch operated after dark, and that libelant was injured by reason of a breach of such custom.

II.—Whether if the absence of a light from the winch was negligence *per se*, libelant did not assume the risk of any injury that might happen to him because of the absence of the light, by working at the winch without
146 objection, in the absence of a light.

III.—Whether in the absence of an allegation that there were no lights on board the steamship which could be placed alongside the winch by the libellant or his fellow-servants, injuries due to the absence of the light ought to be ascribed to the negligence of the libelant or of his fellow-servants, or to the negligence of the shipowners.

IV.—Whether if libelant knew that a rope when stiff and frosty is liable to curl up on the deck when too much slack is run off the winch, and stepped in the place where the rope would be curled up, if it did curl on the deck, without looking to see whether it had curled up or not,
147 he was himself guilty of contributory negligence.

V.—Whether if libelant's business at the winch was finished, and there was ample time for him to leave the winch and go to his quarters before the coil of rope in which he became entangled was coiled on deck by a fellow-servant, at libelant's suggestion, he assumed the risk of injury from this cause, or was himself negligent in remaining at the winch after his business there was finished.

And your petitioner will ever pray, &c.

CONVERS & KIRLIN,
Proctors for Petitioner.

SOUTHERN DISTRICT OF NEW YORK, } ss.: 148
County of New York. }

J. P. KIRLIN, being duly sworn, says: That he is one of the proctors for the claimant and appellant herein; that the foregoing petition is true according to his information and belief, and that the reason why this petition is not verified by the claimant is, that the claimant is absent from the United States at sea. He further says that this petition is made and verified by deponent by direction of the owners of said steamship.

J. P. KIRLIN.

Sworn to before me this 9th day of January, 1894.

CHARLES A. BRODEK,
Notary Public,
N. Y. Co. 149

150

151 At a Term of the United States Circuit Court of Appeals for the Second Circuit, held at the Court Rooms, in the City of New York, on the 12th day of January, 1894.

Present – Hon. WILLIAM J. WALLACE,
Hon. E. HENRY LACOMBE, } *Judges.*
Hon. NATHANIEL SHIPMAN, }

PETER NELSON,
Libelant and Appellee,

152 AGAINST

The Steamship "MANHANSETT," her engines, &c., THOMAS L. EVANS,
Claimant and Appellant.

This appeal having come on to be heard upon the record of the District Court and a decision having been handed down after deliberation affirming the decree appealed from on the opinion of the District Judge:

153 And afterwards, to wit, on the day above mentioned, the appellant, Thomas L. Evans, having filed the annexed petition before the mandate was issued, remanding the cause to the District Court, praying that certain questions specified in the said petition be certified by this Court to the United States Supreme Court for the instruction of the Supreme Court thereon, now after hearing the advocates of the respective parties, it is

ORDERED, that the prayer of the petitioner that the questions specified in the petition be certified to the

Supreme Court of the United States, be and the same 154
hereby is denied.

(Endorsed)—U. S. Circuit Court of Appeals.—Peter Nelson, Libt and Appellee against The Steamship *Manhansett*, &c., Thos. L. Evans, Clmt. and Applt.—Petition and order.—Convers & Kirlin, Proctors for the Petitioner, 5 Beekman St, New York City.—United States Circuit Court of Appeals, Second Circuit.—Filed, Jan. 12, 1894.—John A. Shields, Clerk.

At a Term of the United States Circuit Court of Appeals for the Second Circuit, held in the Court Rooms, in the City of New York, on the 12th day of January, 1894. 155

Present—Hon. WILLIAM J. WALLACE,
Hon. E. HENRY LACOMBE, } *Judges.*
Hon. NATHANIEL SHIPMAN, }

PETER NELSON,
Libelant and Appellee,

AGAINST

The Steamship "MANHANSETT," her engines, &c., THOMAS L. EVANS, 156
Claimant and Appellant.

This cause having come on to be heard on appeal on the transcript of record sent up from the District Court of the United States for the Eastern District of New York, and having been argued and submitted by the advocates of the respective parties, and due deliberation being had, now on motion of Edwin G. Davis, Esq., proctor for the libelant and appellee, it is

157 Ordered, that the decree so appealed from be and the same is hereby affirmed, and that the libelant and appellee recover the costs of this appeal from the appellant and his stipulators, and on the like motion, it is further

Ordered, that a mandate issue accordingly to the said District Court of the United States for the Eastern District of New York commanding the said District Court to take such further proceedings in said cause as according to right and justice ought to be had in conformity with this order.

And upon the application of the claimant and appellant, it is

ORDERED, that the issuance of the said mandate be and
158 the same hereby is stayed until the further order of this Court to enable the claimant to apply to the Supreme Court of the United States for a writ of *certiorari*.

(Endorsed)—U. S. Circuit Court of Appeals.—Peter Nelson Libt. & Appellee against the Steamship *Manhanset* &c., Thomas L. Evans, Clmt. & Appt.—Order for Mandate.—Convers & Kirlin, Proctors for Clmt. & Applnt., 5 Beekman St., New York, N. Y.—United States Circuit Court of Appeals, Second Circuit,—Filed Jan. 12, 1894.—John A. Shields, Clerk.

UNITED STATES OF AMERICA, } ss.:
Southern District of New York, } 159

I, JOHN A. SHIELDS, Clerk of the United States Circuit Court of Appeals, for the Second Circuit, do hereby certify, that the foregoing pages, numbered from 1 to 42, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Peter Nelson, libelant, against the steamship "Manhanset," her engines, &c., Thomas L. Evans, claimant, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, 160
in the Second Circuit, this third day of February, in the year of Our Lord one thousand eight hundred and ninety-four, and of the Independence of the said United States the one hundred and eighteenth.

(Snd.) JOHN A. SHIELDS,
[SEAL.] Clerk.

Office Supreme Court U. S.
FILED.
FEB 5 1894
JAMES H. McKENNEY,
CLERK.

1115

Supreme Court of the United States.

OCTOBER TERM, 1893.

IN THE MATTER

OF

THE PETITION OF THOMAS L. EVANS FOR CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS IN THE SECOND CIRCUIT, IN THE SUIT OF PETER NELSON,

Libelant,

vs.

THE STEAMSHIP "MANHANSET," ETC., THOMAS L. EVANS,

Claimant.

PETITION FOR CERTIORARI.

CONVERS & KIRLIN,
Proctors for Petitioner.

E. B. CONVERS,
Advocate.

The Evening Post Job Printing House, New York.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Thomas L. Evans, claimant of the British steamship *Manhanset*, in the suit of Peter Nelson against the said steamship, respectfully shows unto the Court as follows:

FIRST.—On May 27, 1892, Peter Nelson, a Swede, residing at Sunderland, England, an able seaman on board the British steamship *Manhanset*, filed a libel against said steamship, whereof your petitioner was master, in the District Court of the United States for the Eastern District of New York, to recover damages claimed to have been sustained by reason of personal injuries received by him on board the steamship while loading cargo in the port of New York, on the 11th day of January, 1892.

Your petitioner duly appeared on return of the process issued pursuant to the prayer of the said libel, and filed a claim and answer to the said steamship as lawful bailee thereof for the owner, and upon filing approved security for the claim the steamship was redelivered into his possession. Afterwards, and on the 2d day of August, 1892, your petitioner filed his answer to the libel.

SECOND.—On December 16, 1892, the case came on to be tried before the Honorable Charles L. Benedict, District Judge, upon the evidence of the libelant, and a copy of the Weather Bureau Record for the day of the accident, in support of the libel, and upon the depositions of James Taylor and John Johnson, stevedores engaged in work on the steamer at the time of the accident, and the statement of Walter Albion Morgan, chief engineer of the steamship, on the part of the vessel.

On December 27th the learned District Judge filed an opinion in the cause, directing that a decree be entered in favor of the libelant, with an order of reference to ascertain the amount of his damages. In conformity therewith, an interlocutory decree was entered on December 29, 1892, and on the 21st of January, 1893, the Commissioner to whom the matter was referred filed his report, fixing libelant's damages at the sum of $1,750. On the 9th of February, 1893, a final decree was entered upon the said report, in favor of libelant, awarding as damages and costs the sum of $1,847.95.

THIRD.—Upon the trial the following facts appeared:

The libelant was an able seaman, fifty-one years of age, and a lamplighter on the *Manhanset* (Record, fols. 31, 75). On January 11, 1892, in the afternoon, the steamer was taking in cargo at a dock in New York, from a lighter on steamer's port side (fol. 91). The cargo was going into No. 2 hold (the second from the bow). There were two winches just abaft the hatchway of this hold, one on the port side and one on the starboard side. The foremast was abaft these winches. The No. 2 port winch was in use at the time. The line by which the cargo was hove on board passed from the drum of the winch to the mainmast, thence up and through the tackle, and down into the lighter. The operative working the winch stood facing the bow. The line from the winch passed along the deck to the foot of the mainmast.

During the forenoon there had been slight snow and sleet from 10 to 1 .30 P. M. The weather throughout the day was cloudy (fols. 47–48).

At 5 o'clock libelant was detailed by the chief officer to relieve Douglass, a fellow-servant, at No. 2 port winch, while Douglass went for his tea. Libelant went to the winch and operated it for a period of about twenty minutes, or until 5.30 P. M. (fol. 32). It was dark when he went to the winch. There was no separate light there. It was not customary to have any light at the winches on this vessel when working at night, and libelant knew it (fol. 41). No light was needed for the proper and safe use of the winch. Libelant says, "I had no trouble in running the winch in the dark." He had never asked for any

light by the winch on previous occasions when it was dark or on this occasion (fol. 42).

Douglass returned and relieved libelant at the winch at 5.30 P. M. Libelant did not leave the winch, but giving way to Douglass remained near it; "close by," he says at one place in his testimony; "about four or five feet from it, on the port side of it," he says at another place (fol. 33).

The cargo runner was down in the lighter when Douglass resumed the winch. Without any suggestion from the lightermen or the gangwaymen, who were standing abreast the No. 2 hatch at the port rail (fols. 63, 65) that more rope was needed in the lighter, libelant suggested to Douglass to slack away more of the fall, which Douglass did, running off all the rope from the drum (fols. 32-33).

There is nothing in the evidence to show that libelant looked to see whether the rope when slacked off the winch, ran down into the lighter or whether it coiled up on the deck, except the following passage in his testimony (fol. 40): "Q. When the rope is stiff and frosty [as he says it was here] and you give too much slack at the winch, the man who runs it off gives too much slack, you know the rope is likely to coil up on the deck? A. Not often; sometimes it will happen. Q. Did you think to see if it had happened this time? A. No; I did not look. I did not expect such a thing."

In fact the rope, instead of running down into the lighter, coiled up on the deck.

Libelant's own story of what occurred afterwards is as follows: "I said to him, 'I am going to leave you now.' On the lighter he sings out, 'Heave up,' to Douglass. I stepped forwards to the forecastle.

I was standing on the port side of the winch, about four or five feet from it, forward of it.

I was going in the forecastle on the starboard side.

I did not expect that anything was foul there to run into; it was so dark I could not see, and the rope was just the same as the color of the deck.

There was a bight of the rope on the deck, and I run right into the snarl.

I singed out, 'Stop the winch,' and I singed out again, 'For God's sake, stop the winch, I've got my leg in the coil here.' He got that frightened that he put more steam on, and I singed out again, 'Back the winch.'

Then he put full speed back, and all the rope got in a snarl on my legs. The second mate and Charles Thompson, an able seaman, came running, and said, 'For God's sake man, what are you doing?" He tried to pull me out, but they could not get me out. I was that snarled in that they could not get me clear. The second mate singed out, 'Is there no one got a knife?' Charles Thompson says, 'I've got a good one,' and he cut the rope on the fore part of the winch. The second mate said, 'God in heaven, are we not going to get him out from here, *cut the after part too*' [apparently meaning the part of the rope leading from the drum of the winch abaft to the mainmast]. Then they got me out" (fols. 33, 35).

When Douglass resumed the winch, libelant moved to the port side of it. The forecastle to which he was bound was on the starboard side forward. A clear way to the forecastle, devoid of danger, would have been to pass straight forward from the port side of the port winch, where he was, along the clear deck on that side, past the No. 1 hatch, and across it into the forecastle (fols. 100-101).

Libelant's proposed course was to cross the deck near the winch, and go forward along the starboard side. To do this he had to go abaft the winch and across the rope as it led from the winch to the mainmast, or to go forward of the winch and run the risk of stepping into coils, which he knew were liable to coil up in case too much rope was slacked off the winch.

With two courses open to him, one of safety and one of possible danger, he chose the latter.

Libelant's undisputed testimony showed it was not usual on this vessel to have any light by the winch. There was no clear testimony that it is usual on any vessel. Libelant's evidence showed that he sometimes had lights by the winch on other vessels. Claimant's testimony shows that it is not usual to have a light at a winch on steamships working at night, and not desirable,

as it interferes with signals from the gangway (fols. 55, 76, 77, 92, 99).

There was a light in the lighter alongside the vessel (fols. 44, 82), one in the alleyway, just abaft the winch, under the bridge (fol. 83), a light in the hold (fol. 38), and one at the No. 2 gangway (fol. 76). There was direct evidence that it was not so dark at the winch but that ropes could be seen a considerable distance off (fols. 51, 52, 70, 72, 74, 75, 99, 101).

Libelant testified that if Douglass had stopped the winch when he first called to him, he would not have been injured (fol. 44).

FOURTH.—From the decree of the District Court, the claimant appealed to the United States Circuit Court of Appeals for the Second Circuit, and caused a transcript of the record to be returned to the said court.

FIFTH.—During the October Term (1893) of the said United States Circuit Court of Appeals, to wit, on November 17th, the said cause came on for hearing and was argued before the Honorable William J. Wallace, Honorable E. Henry Lacombe and Honorable Nathaniel Shipman, Circuit Judges, and on a later day in said Term, to wit, on December 5th, the said Court filed a written decision therein, as follows:

"Nelson *v. The Manhanset.*—The decree of the court below is affirmed with interest and costs, on the opinion of the District Judge."

SIXTH.—The opinion of the District Judge, to which reference is here made, was in the following words:

" UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

PETER NELSON

AGAINST

The Steamship " MANHANSET."

DECEMBER 27, 1892.

BENEDICT, *J.*—The personal injuries to the libelant, for which he seeks to recover in this action, arose out of his stepping into a snarl in the fall of the winch, which lay upon the deck of the steamer. The fall was not observed by him, because the winch was running after dark without a light placed so as to enable the fall to be seen by one walking along the deck, and when he stepped into the snarl his leg was drawn into the winch and severely injured.

In my opinion the failure to have a light by the winch, when running after dark, was the cause of the libelant's injury, and was negligence which renders the ship liable for the injury to the libelant resulting therefrom.

The act of the man who was running the winch, in making the winch go faster instead of stopping it when alarm was given that the libelant was caught in the fall, was an act *in extremis*, caused by alarm at the dangerous situation of libelant when caught by the fall.

It cannot be held to be a fault of the man at the winch which contributed to the disaster. The fright of the man at the winch, which caused him to run the winch faster, when it should have been stopped, was one of the results of the failure to provide a light at the winch, and for which the ship is responsible.

Let a decree be entered in favor of the libelant, and an order of reference to ascertain the amount of his damages."

SEVENTH.—Afterwards, and during the same term, to wit, on January 12, 1894, your petitioner presented a peti-

tion to the said United States Circuit Court of Appeals, praying, amongst other things, as follows:

"*Second.*—Your petitioner prays that the following points which he is advised are material to the final decision of this cause, together with a statement of the essential facts, be certified by this Court to the Supreme Court of the United States, in order that its instruction may be obtained thereon, pursuant to Section 6 of the Act of Congress approved March 3, 1891, entitled: "An Act to Establish Circuit Courts of Appeals, &c." namely:

I.—Whether the absence of a light from the winch near which the libelant was injured on the main deck of the *Manhanset* was negligence *per se* on the part of the owners of the vessel, or whether it would be negligence only upon allegation and proof of a custom to have a light by a winch operated after dark, and that libelant was injured by reason of a breach of such custom.

II.—Whether if the absence of a light from the winch was negligence *per se*, libelant did not assume the risk of any injury that might happen to him because of the absence of the light, by working at the winch without objection, in the absence of a light.

III.—Whether in the absence of an allegation that there were no lights on board the steamship which could be placed alongside the winch by the libelant or his fellow-servants, injuries due to the absence of the light ought to be ascribed to the negligence of the libelant or of his fellow servants, or to the negligence of the shipowners.

IV.—Whether if libelant knew that a rope when stiff and frosty is liable to curl up on the deck when too much slack is run off the winch, and stepped in the place where the rope would be curled up, if it did curl on the deck, without looking to see whether it had curled up or not, he was himself guilty of contributory negligence.

V.—Whether if libelant's business at the winch was finished, and there was ample time for him to leave the

winch and go to his quarters before the coil of the rope in which he became entangled was coiled up on deck by a fellow-servant, at libelant's suggestion, he assumed the risk of injury from this cause, or was himself negligent in remaining at the winch after his business there was finished."

On the same day, the said United States Circuit Court of Appeals made an order denying said application, and entered an order affirming the decree, and directing that a mandate issue remanding the cause to the court below, with instructions to take further proceedings in conformity with the said decision, but directing that the mandate be stayed until the further order of the court, in order to allow your petitioner to present this his petition to this Honorable Court for a writ of *certiorari*.

EIGHTH.—Your petitioner is advised and believes that the decision of the said United States Circuit Court of Appeals is erroneous in the following particulars:

1. In deciding that the absence of a light from the winch was negligence *per se* on the part of the owners of the steamship, and was the direct cause of the accident, instead of holding that the absence of a light is evidence of negligence only upon allegation and proof of a custom to have a light by a winch operated under the circumstances disclosed by the testimony.

2. In deciding that libelant's injury was a natural and probable consequence of the absence of a light from the winch.

3. In omitting to decide that libelant could have avoided the consequence of claimant's negligence by the exercise of care.

4. In deciding that libelant did not assume the risk of any injury that might happen to him through the absence of a light by working at the winch without objection, with knowledge that no light was there, and that it was not customary to have a light there on that ship.

5. In deciding that the absence of a light from the winch constituted negligence on the part of the shipowners, instead of ascribing the absence of a light to the negligence of libelant himself (who was lamp trimmer on the steamer) or to the negligence of his fellow-servants, there being no allegation that the steamer was not supplied with lights that might have been placed alongside the winch, the evidence showing there were other lights on deck which presumably might have been so applied.

6. In deciding that the libelant was not guilty of contributory negligence in stepping in a place on the deck where he had reason to know the rope which was run off the winch would be coiled up on the deck, without looking to see whether it was so coiled up or not.

7. In omitting to find libelant was negligent in leaving the winch by a dangerous way, when a safe way was open to him.

8. In deciding that libelant did not assume the risk of injury by remaining at the winch after his business there was finished, while his fellow-servant slacked the rope off the winch and allowed it to coil up on the deck in front of the winch, thus creating the source of danger which was the proximate cause of his injury.

NINTH.—Your petitioner is advised and believes that the questions involved in the decision of this case are of gravity and importance, affecting the duties and liabilities of foreign shipowners to foreign seamen employed upon vessels engaged in commerce with this country, as well as the general law of master and servant, and the reciprocal rights and duties existing between them.

TENTH.—Your petitioner presents herewith a certified copy of the transcript of record returned from the District Court to the United States Circuit Court of Appeals, and of the proceedings in the last named Court.

Wherefore, your petitioner prays that this Honorable Court will by *certiorari* or otherwise, as to it may seem

meet, require the said case to be certified to the Supreme Court for its review and determination, pursuant to the power vested in it by an act of Congress, entitled: "An Act to Establish Circuit Courts of Appeals, and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891.

And your petitioner will ever pray, &c.,

THOMAS L. EVANS,
By CONVERS & KIRLIN,
His Proctors.

E. B. CONVERS,
J. PARKER KIRLIN,
Proctors for Petitioner,
5 Beekman Street,
New York.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss.:

E. B. CONVERS, being duly sworn, says: That he is one of the proctors for the petitioner herein, and that the foregoing petition is true to the best of his knowledge, information and belief. He further says that the reason why this petition is not verified by the petitioner, is that the petitioner is absent at sea, and that this petition is made and presented by authority of the petitioner and of the owner of said steamship *Manhanset*. Deponent verily believes that the decision in this cause relates to matters of gravity and importance, affecting the rights and duties existing between shipowners and seamen, domestic and foreign; that the decision of the United States Circuit Court of Appeals herein is erroneous in the particulars before mentioned; that the foregoing application for a writ of *certiorari* is meritorious, and that the case is a proper one for the extraordinary relief authorized by the statute.

E. B. CONVERS.

Sworn to before me this 24 day of February, 1894.

DUNCAN EDWARDS,
[NOTARIAL SEAL.] Notary Public,
Kings Co.
Certificate filed in New York Co.

FILED
FEB 5 1894
JAMES H. McKENNEY
CLERK

1115

Supreme Court of the United States.

OCTOBER TERM, 1893.

IN THE MATTER

OF

THE PETITION OF THOMAS L. EVANS FOR CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS IN THE SECOND CIRCUIT, IN THE SUIT OF PETER NELSON,

Libelant,

vs.

THE STEAMSHIP "MANHANSET," ETC., THOMAS L. EVANS,

Claimant.

BRIEF FOR PETITIONER.

CONVERS & KIRLIN,
Proctors for Petitioner.

E. B. CONVERS,
Advocate.

The Evening Post Job Printing House, New York.

Supreme Court of the United States,

In re PETITION

OF

THOMAS L. EVANS, Claimant of the Steamship *Manhanset*, for a Writ of *Certiorari*.

BRIEF IN SUPPORT OF PETITION.

The facts sufficiently appear in the petition.

On these facts the following points are urged:

1. Failure to provide a light at the winch was not negligence *per se*. It would only be evidence of negligence upon allegation and proof.

2. The accident was not a reasonable or probable consequence of the omission to provide a light at the winch.

3. If the absence of a light from the winch was negligence *per se*, or evidence of negligence, libelant could have avoided the consequences of it by the exercise of care.

4. If the absence of a light from the winch constituted a breach of duty on the part of the claimant, libelant was

aware of the breach and of the probable consequences of it, and by continuing to work under the prevailing conditions, assumed the risk of injury from that cause.

5. Libelant was negligent in remaining by the winch after his work was done, during the time in which his colaborer unnecessarily slacked off the rope, and coiled it up on the deck, thus creating the source of danger to libelant, which proved to be the cause of his injury.

6. The libelant was negligent in going away from the winch by a dangerous way instead of by a safe way, which was equally open to him.

7. The absence of a light from the winch should be ascribed to the negligence of the libelant or a fellow-servant, not to the shipowner.

8. At most, only one-half damages should have been allowed, under the rule of *The Max Morris*.

Point First.

The absence of a light from the winch was not negligence *per se*, but at most was only evidence of negligence in case of allegation and proof of a custom to have a light at a winch, and a breach of such custom.

The libel makes no reference to a custom, but proceeds apparently on the theory that the absence of a light is negligence *per se* (fol. 10).

Libelant testifies that it was not customary on the *Manhanset* to have a light at the winch, although he had known of lights at the winches of other ships (fols. 41–42). This is the only evidence produced by the libelant upon the point. For the claimant it is shown that it was not only not customary to have a light at the winch, but that it interferes with the winchman's work (fols. 76-77, 91).

It is not suggested that the safe operation of the winch required a light. On the contrary, libelant says it did not (fol. 42).

He worked the winch in the dark, and had done so before without injury.

In *Grant* v. *Union Pacific R. R. Co.*, 45 Fed. Rep., 673, it is held that it is not negligence on the part of a railroad company to have switches without lights on them in its yard, unless it appears that it is the common and uniform practice to have such lights, and that switchmen had the right to expect them.

Shiras, J., in charging the jury (at p. 678), said:

"Now, as to the first allegation of negligence—that the switch had no light upon it, there is no dispute in the evidence upon that. It is admitted, or we assume from the evidence, that it was a switch which had no light upon it. The question is, was that a ground of negligence. Does the fact that there was no light upon the switch authorize you in finding that the company was negligent in that particular? Now, as I have already said to you, the duty and obligation is upon the railroad company to exercise ordinary care, to put proper appliances upon its lands and its yards for its employees, when they are engaged in the performance of their duty. Has there been any evidence produced before you, gentlemen, of parties who have skill and knowledge in that particular, tending to show that the use of a switch without lights is negligence upon the part of the railway company? * * * If there had been evidence introduced, gentlemen, that it was the common and uniform practice among railway companies preceding that time always to have switches with lights, that that was the common practice, and that it was observed, and that the employees had a right to expect that would be done—that would be evidence tending at least to justify you in finding that the railway company was negligent in not having its switch thus equipped."

In *Louisville* v. *Hall*, 91 Ala., 121, the point was whether the omission of "whipping straps" from horizontal switch bars was negligence *per se*. The Court said:

"Is it so manifestly serviceable as to command the concensus of intelligent men so generally as that it cannot be reasonably ignored or disregarded, or, is its utility disbe-

lieved and disallowed in the management of many well-governed and well-regulated railroads? If this question be reasonably debatable, and skilled railroad men honestly differ in judgment as to the utility of this or any other precautionary appliance, and differ to such an extent as that many well-regulated railroads abstain from their use, then such abstention is not legal negligence."

In *Sjogren* v. *Hall*, 53 Mich., 274–278, is was held not negligence *per se* to leave a wheel in a sawmill unguarded, which was safe enough for ordinary use, but without protection along the side of it. A workman fell down and slid along the floor so that his leg was caught in the spokes of the wheel. *Cooley*, C. J., said:

"The unexpected has happened, and we have only to see whether the defendants have neglected any duty in not guarding against it. *We do not learn that there was anything unusual in the bull wheel of a sawmill being left thus uncovered, and we have no right to assume that there was not or we should have been informed.*"

Cases frequently occur where the absence of some precaution which may readily be suggested after the event would have prevented an accident. Whether the absence of those precautions is negligence on the part of the master is not to be determined *a priori*, but is a matter for allegation and proof. In the following cases absence of covering over dangerous machinery, near which servants were required to work, was held not negligence *per se*:

The *Maharajah*, 1 U. S. Ap., 20.
The *Serapis*, 4 U. S. Ap., 49.
Pingree v. *Layland*, 135 Mass., 398.
Townsend v. *Langees*, 41 Fed. Rep., 919.

Point Second.

The accident was not a consequence which could reasonably have been foreseen as the natural and probable result of a failure to have a light by the winch.

Libelant was not injured while working the winch, nor was he injured by the winch itself. He was injured by stepping into a rope on what the Court has found to be an unlighted part of the deck. The case is the same therefore as though libelant had stumbled over an anchor, or a davit, a rope, or a pipe, or any other obstruction on any other unlighted part of the deck, except that the source of the injury was not a permanent or fixed obstruction, or one known to be likely to arise. It was not therefore one which the owner ought reasonably to have foreseen and provided against. His duty is to use due care, not extraordinary care; to provide against accidents which may reasonably happen, not against extraordinary accidents which no reasonable man, intending to use due care for the prevention of accidents, would foresee as likely to occur.

Pollock on Torts, 38.
Thompson on Negligence, 1083.
Sjogren v. *Hall*, 53 Mich., 274.
Pittsburgh Ry. vs. *Taylor*, 104 Pa. State, 306.
Cox v. *Berbidge*, 13 C. B., N. S., 430.
Sharp v. *Powell*, L. R., 7 C. P., 253.

The real but unexpressed ground upon which the steamship is to be held is that a man is presumed to intend the natural and probable consequences of his acts and to be responsible for the natural and probable consequences of his omissions.

Pollock, in his valuable treatise on torts, states the rule on this subject as follows (p. 36):

"The doctrine of natural and probable consequences is most clearly illustrated however in the law of negligence,

for there the substance of the wrong itself is failure to act with due foresight; it has been defined as the omission to do something which a reasonable man, guided upon these considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do (*Alderson, B.. in Blythe* v. *Birmingham*, 11 *Exch.*, 781).

Now, a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonble man then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable or waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that if in a prior case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability, and the statement proposed, though not prositively laid down in *Greenland* v *Chaplin* (*per Pollock, C. B.*, 5 *Exch.*, *at page* 248), namely: 'that a person is expected to anticipate and guard against all reasonable conse quences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur,' appears to contain the only rule tenable on principle where the liability is founded solely on negligence. The mischief which could by no possibility have been foreseen, and which no reasonable person could have anticipated, may be the ground of legal compensation under some rule of exceptional severity, and such rules, for various reasons, exist, but under an intelligible rule of due care and caution it cannot be taken into account.'

In Sjogren v. *Hall*, 53 *Mich.*, 274, a workman in the course of his employment accidentally fell and slipped over into a wheel, which the Court found was safe enough for ordinary use without cover. The wheel had been standing still, but just when libelant fell started up, so that libelant's leg was caught and broken. The Court (at p. 277) said:

"The plaintiff relies for a recovery upon the negligence of the defendants in leaving the wheel uncovered. It

was shown on the trial that at a very small expense a protection could have been constructed at the side of the wheel, which would have rendered this accident impossible, and it is contended that the failure to provide this protection is such culpable disregard for the safety of those whom the defendants employed as to make them responsible for the consequences. If this accident which occurred was one at all likely to happen, if it was a probable consequence of a person working about the wheel that he would be caught in it, as the plaintiff was, there would be ground for pressing this argument; but the accident cannot be said to be one which even a prudent man would have been likely to anticipate. The implement from which danger might come was a revolving wheel fully exposed to sight, and much less dangerous, one would suppose, than the saws in the same mill, which could not possibly be covered. It would be difficult to mention any kind of ordinary machinery in a manufactory of any sort which before an accident had occurred would seem less likely to have caused one.

"The unexpected has happened, and we have only to see whether the defendants have neglected any duty in not guarding against it. *We do not learn that there was anything unusual in the bull wheel of a saw mill being left thus uncovered, and we have a right to assume that there was not, or we should have been informed.* Plaintiff was at work in the same room where he saw the wheel continuously, and was as much bound to expect danger from it as was any one, but apparently he had no suspicion that the wheel was likely to do him harm, and it in fact would not have harmed him had not a very unexpected and antecedently improbable accident brought his feet within the arms of the wheel. A similar accident, attended by equally serious consequences, might happen almost anywhere, or in any machine shop, or on a farm as well as a mill, and after it had happened it would be easily seen how it might have been avoided. But the fact that it was avoidable does not prove that there was fault in not anticipating and providing against it.

"If a farm laborer falls from a hay mow, the fall does not demonstrate that the farmer was culpable for not railing the mow in. A man stumbling in a blacksmith's shop, might have his hand or even his head thrown under the trip hammer, but it would not follow that there had been any neglect of duty on the part of the blacksmith in leaving the hammer exposed. So far as there is a duty resting upon the proprietor in any of these cases, it is a duty to guard against probable danger, and it does not go

to the extent of requiring him to render incidental injuries impossible. * * *

"The precise accident that occurred in either of these cases might never occur again at all. The next might be something entirely different, and require altogether different precautions; but it might nevertheless be seen after it had occurred that it could have been easily guarded against. If the fact that prevention was possible is to render the employer liable, then he may as well be made insurer of the safety of those in his service, in express terms, for to all intents and purposes he would in law be insurer, whether nominally so or not. But this would work a radical change in the law of negligence in its application to the relation in which these parties stood to each other."

Under this rule, if a horse escapes into a public road, and kicks a person who is lawfully on the road, its owner is not liable unless he knew the horse to be vicious (*Cox* v. *Berbidge*, 13 C. B., N. S., 413). He was bound, indeed, to keep his horse from straying, but it was not an ordinary consequence of a horse being loose on a road that it should kick human beings without provocation.

In *Sharp* v. *Powell*, L. R., 7 C. P., 253, the defendant caused his van to be washed in a public street, contrary to an act of Parliament. The water ran down a gutter, and but for a hard frost, which had then set in for some time, would have run harmlessly down a grating into the sewer at a corner some 25 yards from where the van was washed. As it happened, the grating was frozen over; the water spread out and froze into a sheet of ice, and a led horse of the plaintiff's slipped thereon and broke its knee. It did not appear that the defendant or his servants knew of the stoppage of the grating. The court thought the damage was not within the ordinary consequences of such an act as the defendant's; not one which the defendant could fairly be expected to anticipate as likely to ensue from his act; that he could not reasonably be expected to foresee that the water would accumulate and freeze at the spot where the accident happened, and that he was not liable.

So here. The claimant could not reasonably be expected

to foresee that the rope would coil up on the deck at the spot where the accident happened; his failure to provide against this possible contingency is not therefore legal negligence.

Point Third.

If the omission to have a light by the winch was negligence *per se*, or evidence of negligence, libelant could have avoided the consequences of such negligence by the exercise of care.

Libelant must on his own evidence (fol. 40) be charged with knowledge that the rope when slacked off after the fall was down in the lighter would be likely to coil up on the deck. He says he did not look to see if that was the case here, but if it be said he could not have seen, had he looked, yet he could have discovered the rope by pushing his foot along the deck.

Taylor v. *Carew Co.*, 140 Mass., 150, 152.

In that case a servant walked quickly in a dark basement room, where he should have groped carefully, fell into an unguarded hatchway hole.

Devens, *J.*, said:

"On this evidence, it appears that he knew of the existence of this well hole and of the danger to which it exposed him; that he had no reason to suppose it to be guarded, and he does not state that he did so suppose. Under these circumstances he took the risk of a danger which he knew and appreciated. Indeed, his description of the accident shows distinctly a want of due care in performing that which he undertook in the darkness which prevailed in the basement room. To walk quickly when his eyes afforded practically no assistance, without by either hands or feet attempting to find the hole which he knew was there somewhere, although he could not tell exactly where, was a failure on his own part to take proper precautions."

Refer also to

Inland Co. v. *Tolson*, 139 U. S., 551.
The Jersey City, 46 Fed. Rep., 134.
The Gladiolus, 22 Fed. Rep., 454.
The Sir Garnet Wolseley, 41 Fed. Rep., 896.

Point Fourth.

If the claimant was under a duty to have a light by the winch, and failed in that duty, libelant was aware of the failure, and assumed the risk of injury from that cause.

We must premise that it was as dark when the libelant went to the winch as when he was injured (fol. 42); that he had no difficulty in operating it in the dark (fol. 42); that he had frequently worked it before and knew there was no custom to have a light (fol. 41); and that he had never asked for any light to be placed by the winch (fol. 42).

In such circumstances libelant should be held to have assumed the risk of injuries resulting or likely to result from the absence of a light.

Hough v. *Railway*, 100 U. S., 213, 224.
Grant v. *Union Pacific*, 45 Fed. Rep., 673.
Downey v. *Sawyer*, 157 Mass., 418, 420.
The Serapis, 4 U. S. App., 49.
The Maharajah, 1 U. S. App., 20.
Pingree v. *Leyland*, 135 Mass., 398.

In *Hough* v. *Railway*, 100 U. S., 213 (at p. 224), Mr. Justice Harlan, said:

"If the engineer after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine without giving notice thereof to the proper officers of the company, he would, undoubtedly, have been guilty of such contributory negligence as to bar a recovery, so far as such defect is found to have been the

efficient cause of the death. He would be held, in that case, to have himself risked the dangers which might result from the use of the engine in such defective condition."

In *Grant* v. *Union Pacific R. R. Co.* (*supra*), *Shiras, J.*, charging the jury, said (p. 679):

"But now, suppose, gentlemen, that you should find there was negligence upon the part of the railway company—having that switch there without a light upon it—suppose you should find that—there arises, then, another question as to the effect of the plaintiff's knowledge in regard to it. There is a principle recognized in the law that when a person goes into a service or employment and finds it is conducted in a particular way, that certain appliances are used, and he makes no complaint about it, but goes ahead and performs his work and labor with the appliances in the condition in which he finds them, and is not induced to remain in the employ by promises that it will be changed, ordinarily he is held to assume the risk that arises from that mode of carrying on the business."

In Birmingham v. *Allen*, 20 Lawyers' Reports, Annotated (Ala.), 457: The negligence charged was the want of a light or target at a switch.

The Court said: "The evidence shows without dispute that the plaintiff has been in the employ of the defendant as conductor for a year. He testified himself that "the switch had no light or target on it, and had not since I had been running on the road. There never had been a lock or means of fastening on it, since I went on the road, a period of twelve months. I had been running on the road for twelve months." *In Georgia* v. *Davis*, 92 Alabama, 200, the principle is thus clearly stated: 'The duty of the company to this class of its employees, is to provide a roadway in all respects reasonably safe for the running of its trains and the performance of the functions imposed upon them by the exigencies of the service; and they have a right to assume, without inquiry or investigation, that this duty has been discharged. The onus of inquiry or investigation is not upon them. If, as a matter of fact, they knew of unsafe conditions in any of these particulars, and continued in the service after the lapse of a reasonable time for the defects to be remedied or removed, they assumed this additional risk, though originally not incident to their employment.' Many things are stated in

support of the proposition, and it is manifestly just. If it be conceded that the failure to provide a lock or proper fastening for the switch be a culpable defect, there are no facts in the present record to relieve the plaintiff from being held guilty of contributory negligence under the influence of the foregoing principles."

Where the liability to injury is appreciated, it is not necessary the workman shall appreciate the whole extent of the danger.

Downey v. *Sawyer*, 157 Mass., 418, 420.

In *Stubbs* v. *Atlanta*, 17 S. E. Repr. (Ga.), the Court held that a servant, who was familiar with a machine and its ordinary dangers, could not recover for injuries incurred by exposing himself to unseen and unknown danger at night, which he might have discovered by the exercise of care, though the employer omitted to furnish light for the work.

Point Fifth.

Libelant was negligent in unnecessarily remaining by the winch after his business there was finished, while his co-laborer slacked off the rope and coiled it upon the deck.

When Douglass returned to the winch from his tea, the cargo runner leading from the winch was down in the lighter (fol. 32). Without any call for more slack, libelant himself suggested that those in the lighter might want more. Thereupon "Douglass let all the remaining rope on the winch run off" (fol. 32). Libelant was then standing on the port side of the winch, about four or five feet from it, forward of it (fol. 33), and was proposing to go to the forecastle on the starboard side (fols. 33, 34). Libelant said: "I am going to leave you now," and in the meantime they sung out on the lighter "heave up." As libelant stepped forward across the front of the winch,

some of the fall was taken up by the drum and the libelant's leg was caught in it (fols. 33, 39). He did not look to see whether the rope, which was stiff and frosty, had curled up on the deck when Douglass allowed it to run off. "I did not expect such a thing" (fol. 40). He had stood there by the winch "about two minutes—not that," after Douglass relieved him (fols. 40, 41).

The question of minutes is not important. It may have been two minutes or five, but it was beyond the time libelant's business required him to stay there. It so happened that the interval he did stay after being relieved was that in which the source of danger was created by his fellow-servant, at his own suggestion. If he had left promptly on being relieved it is indisputable that the accident could not have happened.

Point Sixth.

Libelant was negligent in choosing a way he had reason to know might be dangerous in going away from the winch to his quarters, instead of going by a way he knew was safe.

The cargo was being taken in the No. 2 hatch. The winch was abaft this, between the hatch and mainmast, the line leading from the winch to the mainmast (fol. 99). Libelant, of course, was aware of this, and must have known that he could not cross the deck from port to starboard *abaft* the winch without crossing the rope on the deck. He must be deemed to have known that if more slack was run off the drum than was required it would coil on the deck *forward* of the winch (fol. 40). He did not therefore exercise due care in attempting to cross the rope in the dark, with knowledge that it had been run off the drum, especially without looking or groping along to ascertain whether it was coiled up on the deck.

It is proved there was a clear way for him to proceed from the port side of the port winch, where he had been at work, along the port side of the vessel, thence across the No. 1 hatch to the sailors' forecastle without any danger from absence of light or otherwise (fol. 100).

Upon this testimony it is submitted there is not a preponderance of proof that a light was necessary for him to go with safety from the winch to the forecastle If he had proceeded in the way he started to go, before the rope was run off the drum and coiled upon the deck, that way would have been safe; or, if he had gone the other way, along the port side, after the rope was run off and coiled up there would have been no risk. He should not have walked into known or apprehended danger, except at his own risk.

Where two courses of action are equally open to a workman, one of which is, or reasonably ought to be, apprehended to be dangerous, the other of which is safe, he cannot recover if injured by adopting the more dangerous course, although the defendant be in some degree negligent.

In Elliott v. *Chicago Railway*, 150 *U. S.*, 245 (*at p.* 248), *Mr. Justice Brewer said*:

"This is not a case in which one placed in a position of danger through the negligence of the company, confused by his surroundings, makes perhaps a mistake in choice as to the way of escape and is caught in an accident, for here the deceased was in no danger. He was standing in a place of safety on the south of the main track. He went into a place of danger from a place of safety, and went in without taking the ordinary precautions imperatively required of all who place themselves in a similar position of danger."

In Chicago Railway v. *Hoedling*, 10 U. S. App., 422, at p. 426), Sanborn, Circuit Judge, laid down the rule as follows:

"If he voluntarily and unnecessarily places himself in a position that he knows is dangerous, or that an ordina-

rily prudent man in his position would know was dangerous, and is thereby injured, when there are other positions that he might take in the discharge of his duty that are safe, he cannot recover of the defendant, although the latter is in some degree negligent."

Citing

Bunt v. *Sierra Butte Co.*, 138 U. S., 483.
Railroad Company v. *Jones*, 95 U. S., 439.
Cunningham v. *Chicago Ry.*, 17 Fed. Rep., 882. (Miller, *J.*)

In Bennett v. *Railroad Company*, 102 U. S., 577, where persons walking from a railroad station to a steamboat wharf, through the depot, fell into an uncovered hatchway, the defendant was held responsible, but apparently on the ground "there was no path or safe or convenient way around the said depot to the wharf" (p. 579).

Point Seventh.

In the absence of allegation or proof that there were no lights which might have been placed by the winch if required the omission to place a light there should be ascribed to the negligence of libelant, or a fellow-servant.

The evidence shows there were lights on deck and about the ship, and presumably (the contrary is not charged) some of those or others in the ship could have been placed alongside the winch. Libelant was himself the lamp trimmer (fol. 75) and as such it would, ordinarily, be his duty to place the lights where required. If, on the contrary, lights were not to be placed except upon order of an officer, then the negligence of the officers to direct that a light be placed at the winch, if required there, would be the negligence of a fellow-servant.

All the members of a ship's company, from the captain down, are fellow-servants.

Loughlin v. *State of New York*, 105 *N. Y.*, 159.
Hedley v. *Pinkney & Sons' Steamship Company* (1892), 1 *Q. B.*, 58, 62.
Liddy v. *Gibson*, 11 *Cl. Sess. Cas.* (*3d Ser.*), 304.
The City of Alexandria, 17 *Fed. Rep.*, 390, 392.

Point Eighth.

If the absence of a light from the winch was negligence *per se*, or evidence of negligence, and libelant's injury ought reasonably to have been foreseen as a natural and probable consequence thereof, still (1) if libelant could have avoided the consequence of the negligence by the exercise of due care, and did not, or (2) if libelant was negligent in remaining by the winch after his business there was finished, or (3) was negligent in choosing a dangerous instead of a safe way in going from the winch to his quarters, or (4) if the absence of a light from the winch is ascribable to his own or his fellow-servant's negligence, only one-half damages should have been awarded.

The Max Morris, 137 *U. S.*, 1.
The Explorer, 20 *F. R.*, 135.
The Wanderer, 20 *F. R.*, 140.
The Ashbrooke, 44 *F. R.*, 124.
The Cyprus, 55 *F. R.*, 332.
The Truro, 31 *F. R.*, 158.

Point Ninth.

The writ should issue, as prayed.

New York, February 2, 1893.

E. B. CONVERS,
J. PARKER KIRLIN,
Proctors for Petitioner.

Supreme Court

OCTOBER TERM, 1[illegible]

IN THE MATTER

OF

THE PETITION OF JOHN [illegible]

the Steamer [illegible]

Courtenay, &c., &c., [illegible]

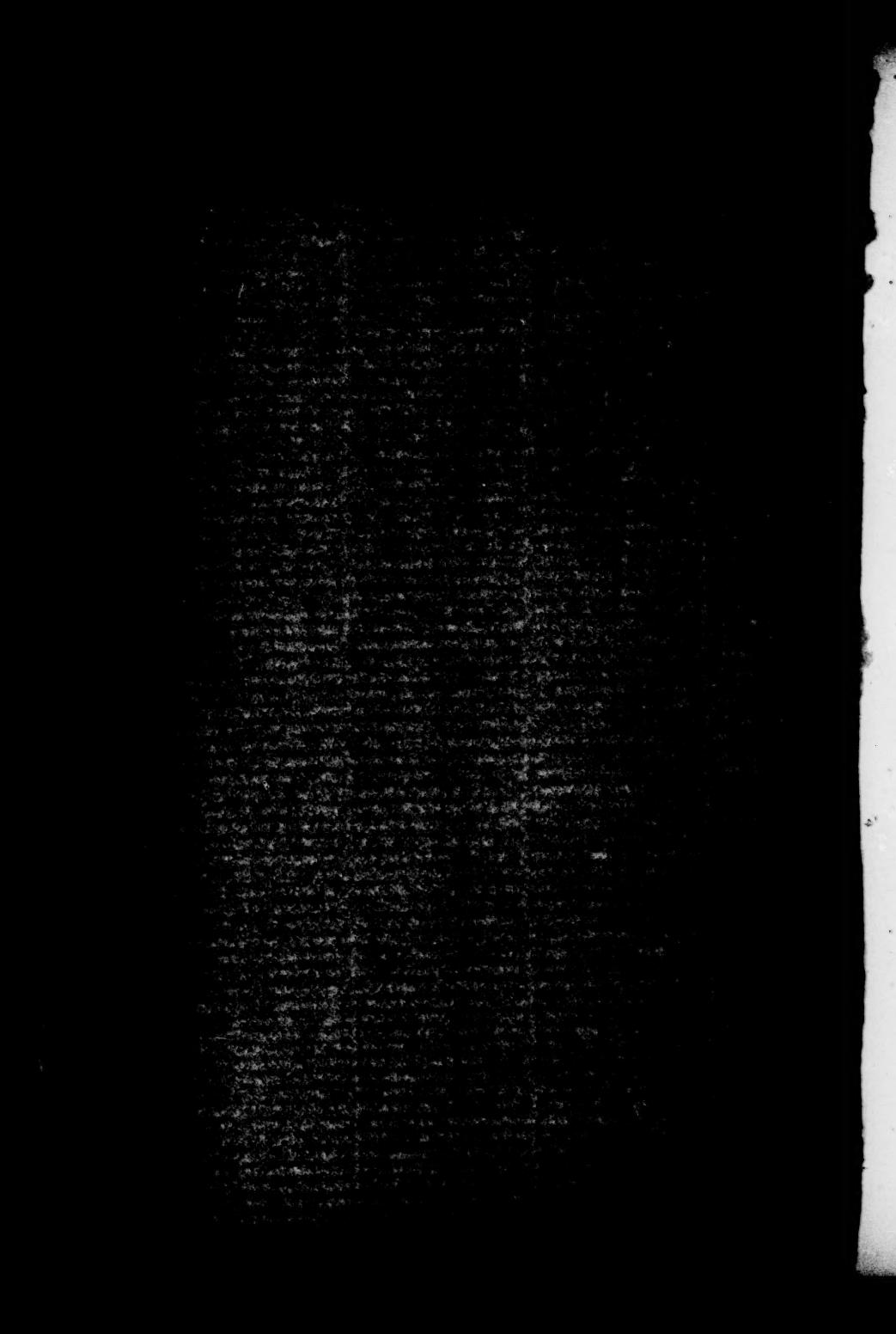
Appeals, for the Second Circuit.

PETITION

[illegible]

[illegible]

1



To the Supreme Court of the United States of America:

The petition of John Scully, owner and claimant of the steamtug "*E. A. Packer*," for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to bring before the United States Supreme Court the case of The New Jersey Lighterage Company *against* the steamtug "E. A. Packer," her engines, &c. 2

The petitioner respectfully shows to this Court:

First.—The libel herein was filed against the steamtug "E. A. Packer" in the District Court of the United States for the Southern District of New York on the 29th day of October, 1880. I was, and still am, claimant and owner thereof.

Second.—That Court, after trial on verbal testimony, dismissed the libel with costs.

Third.—An appeal was then taken by the libellant to the Circuit Court of the United States. 3 Additional testimony was given, consisting of expert evidence only, which, however, has had no weight in determining the subsequent course of the proceedings. The Circuit Court, on the 4th day of December, 1886, reversed the decree, and gave judgment for the libellants, *on certain findings of fact.* The aforesaid Circuit Court declined to give, or to refuse, a finding of fact pro-

posed by the claimant, which finding was deemed by the claimant to be material, and of an ultimate character.

Fourth. –Thereupon, an appeal was taken to this Court by the claimant, and a record of proceedings and of testimony was certified and forwarded to this Court. The sole ground on which the claimant sought to maintain his appeal was, because the finding of fact, hereinbefore alluded to, had not been given.

Fifth.—The record, aforesaid, was filed in this court, and jurisdiction assumed, (the cause being in admiralty, and involving more than $5,000), on the 27th day of October, 1887.

Sixth.—Thereafter, to wit, on the 3d day of April, 1891, the cause came on for hearing. The arguments of counsel, the aforesaid record which had been submitted, the subsequent opinion and mandate of this Court, all show that the only question presented, was this, to-wit: Was the finding of fact which had been proposed by the claimant to the Circuit Court of a material and ultimate character, and, therefore, did the refusal of the Circuit Court to pass upon it, call for a reversal of its judgment?

Seventh.—On the 11th day of May, 1891, this Court reversed the aforesaid judgment, *but did not order a new trial.* The proceedings were remanded to the Circuit Court, with directions to proceed in accordance with the opinion of this Court (*vide*, E. A. Packer, 140 U. S. R., 360).

Eighth.—When this decision was made, and the

mandate sent down to the Circuit Court, together with the record aforesaid, the joint resolution amendatory of the "Act to establish Circuit Courts of Appeals" had become a law. 7

Ninth.—The cause came to be heard again before the same Circuit Court, on the 14th day of December, 1891.

No new testimony was offered, but the Circuit Court held, that the proceeding was a new trial, and heard read, and took in, all the testimony which had been previously certified from the District Court.

The cause stood, on the facts, precisely as it had stood when it was decided by the Circuit Court on the 4th day of December, 1886. 8

Rule II. of the Board of Supervising Inspectors, which had been discussed at length in your opinion, (140th U. S. R., 367-368) was read.

The Court, thereupon, found affirmatively, as had been requested by the claimant, the fact for the sake of which the appeal to this Court had been taken. That is to say, the Court made a finding of fact in favor of the claimant, which this Court had previously declared to be material and ultimate, and in behalf of which had reversed the previous judgment of the Circuit Court. (To the same effect is the opinion in the case of "The City of New York," 147 U. S. R., 77, where the case of the E. A. Packer is cited). 9

Tenth.—The Circuit Court, thereupon condemned the E. A. Packer a second time, with interest and additional costs.

This decree was made, and entered, on the 18th day of February, 1892.

10 *Eleventh.*—Meanwhile, to wit, on the 3d day of March, 1891, the joint resolution amendatory of the act, creating a Circuit Court of Appeals, had taken effect.

Seeing that the decision of the Circuit Court had not been made, and entered, until February 18, 1892, the question then arose whether an appeal should be taken to this Court, whence the mandate had come, or to the Circuit Court of Appeals.

Your petitioner was advised that his appeal should be taken to this Court, because the case was pending in this Court on the 3d day of March, 1891, when the aforesaid joint resolution went into
11 effect.

Accordingly, application was made to a justice of this Court on the 21st day of March, 1892, for permission to appeal to the Supreme Court, but permission was refused, on the 26th day of March, 1892, in the following words: "I am of opinion that your appeal must not be to this Court, but to the Circuit Court of Appeals.

SAMUEL BLATCHFORD."

Twelfth.—There was no recourse left to your petitioner, except to appeal to the Circuit Court of Appeals. Such appeal was taken on the 31st
12 day of March, 1892.

The record taken to the last named Court consisted of the record remanded from this tribunal, together with such testimony as had been submitted to the Circuit Court on the first trial, and which had not been sent to this Court, in the record filed on the appeal to this Court, because it had been deemed unimportant and immaterial, and had not been requested by either side.

Thirteenth.—The cause came on to be argued in the said Circuit Court of Appeals, on the 9th day of May, 1893. It was decided on the 17th day of October, 1893, and the decree of the Circuit Court was affirmed and the E. A. Packer was condemned to pay additional damages and costs. 13

Fourteenth.—The Circuit Court of Appeals declared, substantially, that it was a fault, *de jure*, for the Packer to have starboarded her wheel, and gave no other reason for condemning her.

No allusion was made, in the opinion of the Court of Appeals, to the all important fact that the opposing vessel had ported her wheel, some five points, just before the collision occurred. 14

Neither does the Court allude to the equally important fact, that the Packer had contributed, in nowise, to the collision by having starboarded her wheel, seeing that she would have gone clear of the Wolverton by an assuredly safe distance, if the latter had not changed her course.

Your petitioner is advised that the Circuit Court of Appeals must have decided that it was a fault, *de jure*, for the Packer to have starboarded her wheel.

Fifteenth.—Afterwards, your petitioner moved for a reargument and set forth the facts hereinbefore stated as ground for such reargument, and particularly called attention to the proposition that the evidence showed, without dispute, that the Packer had done no harm, whatever, in starboarding her wheel, nor in any way contributed to the collision thereby. 15

The petitioner requested that, if the petition to re-argue should be denied, then that the following questions should be certified to this Court for instruction:

16 *First.*—"Whether or not the Supreme Court intended by its reversal of the judgment obtained herein in the Circuit Court, on the 4th day of December, 1886, to order a new trial in the Circuit Court; or whether, on such reversal, only the question was to be considered whether or not the steamtug Wolverton had ported her helm a very short time before the collision to the extent of four or five points?"

Second.—"Did the Supreme Court intend that all the findings of fact, theretofore made by the Circuit Court, were rendered null by its decision reversing
17 the judgment, so that either or both parties to the litigation might offer new proofs on any relevant issue; or did said Court intend that the findings of fact, already made, should stand as valid, subject only to such modification as the additional finding of fact aforesaid, if affirmed, might produce."

Third.—"Was it not the intention, and in effect the determination, of the Supreme Court, that the libel herein should be dismissed, provided the Circuit Court found, on sufficient evidence, that the Wolverton had ported her wheel, four or five
18 points, when she was about 200 feet away from the Packer?"

Fourth.—"Did the Supreme Court intend that a decree should be again entered against the appellant, the owner of the Packer, with additional costs and damages in case and after the Circuit Court had made the aforesaid finding in his, favor, for the non-finding of which the claimants appeal to the Supreme Court had been sustained?"

Fifth.—"Assuming that the Packer and the Wolverton were approaching starboard to port, and that the Packer, after signaling at a distance from the Wolverton of 500 yards or more, starboarded her wheel and went to port, was this fact in and of itself a condemnatory fault?"

This motion was denied, without opinion, but the mandate was and still is held, pending this application.

Sixteenth.—A question to which your attention is now most earnestly called, is whether or not your petitioner is entitled, as matter of right, to bring this cause by way of appeal, to this Court.

Seventeenth.—In this petition, only facts have been stated, and in as concise a form as possible.

Eighteenth.—In the certified record submitted with this petition, vertical black lines drawn here and there in the margins of the pages, include the whole record that was heretofore submitted to this Court.

Wherefore your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this case directed to the Circuit Court of Appeals for the Second Circuit to bring up this case to this Honorable Court for such proceedings therein as to this Court shall seem just.